86-940

No. 86-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PACIFIC FIRST FEDERAL SAVINGS BANK,
PRICE WATERHOUSE and
KAPLAN, SMITH & ASSOCIATES, INC.,
Petitioners,

v.

WAYNE C. REMBOLD, KAREN D. REMBOLD,
DARRELL STEELE and LYLE SCHNEIDER,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Can the exclusive jurisdiction which Congress vested in the courts of appeals to review challenges to the terms and conditions by which a federally-chartered savings bank converts from mutual to stock form of ownership, pursuant to the regulatory approval of the Federal Home Loan Bank Board, be subverted by casting the challenge in terms of a claim for alleged violations of federal securities laws?

PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties to the proceeding in the court whose judgment is sought to be reviewed, except that the following persons, who were plaintiffs in the District Court, voluntarily dismissed their claims while the case was pending in the Court of Appeals:

Clint Hergert
Henry Griffin

Additionally, petitioner Pacific First Federal Savings Bank is a wholly-owned subsidiary of Pacific First Financial Corporation.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, Pacific First Federal Savings Bank, Price Waterhouse and Kaplan, Smith & Associates, Inc., respectfully pray for a writ of certiorari to review the opinion and judgment entered in this proceeding by the United States Court of Appeals for the Ninth Circuit on September 3, 1986, reversing the District Court's dismissal of a complaint for lack of subject matter jurisdiction.

OPINIONS BELOW

The decision of the United States Court of Appeals is published at 798 F.2d 1307. It is included in the Appendix at pp. 1a-12a. The judgment and opinion of the District Court dismissing the complaint are unreported. They are included in the Appendix at pp. 13a-22a.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on September 3, 1986. A timely petition for rehearing was filed on September 17, 1986 and denied on October 30, 1986. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

12 U.S.C. 1464(i)(2) (1982) provides:

> Subject to the rules and regulations of the [Federal Home Loan Bank] Board, any Federal association may convert itself from the mutual form to the stock form of organization, or from the stock form to the mutual form, and any Federal association may change its designation from a Federal savings and loan association to a Federal savings bank, or the reverse.

12 U.S.C. 1464(i)(4) (1982) provides:

> Any aggrieved person may obtain review of a final action of the [Federal Home Loan Bank] Board or the Federal Savings and Loan Insurance Corporation which approves, with or without conditions, or disapproves a plan of conversion from the mutual to the stock form, only by complying with the provisions of subsection (k) of section 408 of the National Housing Act [12 U.S.C. § 1730a(k) (1982)] within the time limit and in the manner therein prescribed, which provisions shall apply in all respects as if such final action were an order the review of which is therein provided for, except that such time limit shall commence upon publication of notice of such final action in the Federal Register or upon the giving of such general notice of final action as is required by or approved under regulations of the Corporation, whichever is later.

Section 408(k) of the National Housing Act, 12 U.S.C. § 1730a(k) (1982), provides, in relevant part:

> Any party aggrieved by an order of the [Federal Savings and Loan Insurance] Corporation under this section may obtain a review of such order by filing in the court of appeals of the United States for the circuit in which the principal office of such party is located, or in the United States Court of Appeals for the District of Columbia Circuit, within thirty days after the date of service of such order, a written petition praying that the order of the [Federal Savings and Loan Insurance] Corporation be modified, terminated or set aside. . . . Upon the filing of such petition, such court shall have jurisdiction, which upon the filing of the record shall be exclusive, to affirm, modify, terminate, or set aside, in whole or in part, the order of the [Federal Savings and Loan Insurance] Corporation. . . .

STATEMENT OF THE CASE

A. Preliminary Statement

This case presents a question of vital importance to the well-being of the federal savings and loan industry and the ability of its oversight agency, the Federal Home Loan Bank Board ("FHLBB"), to exercise its powers and authority as Congress intended. At issue is the subject matter jurisdiction of federal district courts over a challenge to the terms and conditions by which a federal thrift institution converts from "mutual" to "stock" form.[1] Congress expressly provided that any such challenge be brought exclusively in a court of appeals. 12 U.S.C. §§ 1464(i)(2), 1464(i)(4), 1730a(k) (1982).

In a decision which conflicts with decisions of both the Tenth and Eleventh Circuits, the Ninth Circuit effectively ruled, in this case, that district courts may exercise jurisdiction over

[1] In the "mutual" form, certain of the customary prerogatives of ownership, including the right to vote for directors, are exercised by the depositors of an institution. In the "stock" form, such rights are, of course, exercised by the stockholders.

such challenges as long as the plaintiff artfully casts the challenge as a claim under the private damage remedies of the federal securities laws. The Ninth Circuit's decision, if allowed to stand, would replace the FHLBB's expertise, experience and Congressionally granted exclusive authority to determine the terms and conditions upon which a thrift may convert, subject to review in a court of appeals within a limited period of time, with an open-ended system in which the results of a conversion could be modified or set aside by diverse district court judges and juries at any time within the lengthy limitations period applicable to suits under the federal securities laws.

The wisdom of Congress' choice is not at issue, nor should it be. When Congress created the federal thrift industry in 1933, it entrusted the FHLBB with broad powers to supervise the industry. The FHLBB has since developed a complex regulatory scheme to take account of the well-being of individual institutions and their depositors, as well as the entire network of institutions, each dependent upon the financial integrity of the other and of the federally-backed insurance program administered by the FHLBB. Congress has authorized the FHLBB to allow institutions to convert from "mutual" to "stock" form as a means of infusing much-needed capital into individual institutions, thereby protecting the industry and the federal insurance program. Congress entrusted the FHLBB with the exclusive power to regulate conversions and expressly limited the jurisdiction of federal courts to interfere with that vital process. Among the most important facets of this regulation is the process chosen by the regulator to set the price at which stock in the converting institution is offered to the public—a decision which, in turn, determines how much capital is realized by the converting institution.

In light of the fact that chronic undercapitalization is the most fundamental and significant problem today facing the federal thrift industry, an industry Congress created over fifty years ago and which it today regards with continuing interest and considerable concern, it cannot be gainsaid that this case presents important questions of national significance.

B. Facts Material To The Question Presented

In the summer of 1983, Pacific First Federal Savings Bank ("Pacific First") converted from the "mutual" to "stock" form of ownership, under the strict supervision of, and pursuant to detailed regulations issued by, the Federal Home Loan Bank Board ("FHLBB"). Respondents, plaintiffs below, by virtue of their status as depositors of Pacific First prior to the conversion, had and exercised preferential rights to acquire conversion stock during the "Subscription Offering" phase of the conversion. *See* 12 C.F.R. § 563b.3(c)(2), (3) and (4) (1983).[2] These preferential rights are valuable because a purchaser of conversion stock effectively acquires a percentage of the pre-conversion net worth of the institution for free, since all money paid for conversion stock during the Subscription and Public Offering phases (less expenses) goes into the institution itself, thereby increasing the institution's post-conversion net worth in an amount equal to the price of the stock. Investors obtain a pro-rata interest in the entity based solely on the percentage of the new capital contributed, and the "ownership" rights of the depositors are extinguished.[3] A purchase of stock in a conversion is thus unlike the typical purchase of stock in a public offering by an issuer of its securities, which results in a redistribution of the ownership interests among the prior owners and the new investors.

FHLBB regulations dictate how the price of the conversion stock is determined. *See generally* 12 C.F.R. §§ 563b.3(c)(1), 563b.7 (1983). In particular, the FHLBB requires, among other things, that the total price of all of the stock issued and sold in the conversion equal the market value of the institution. *Id.* at § 563b.3(c)(1). This value must be determined by an independent appraisal, performed according to rigorous FHLBB guidelines and reviewed and approved by the FHLBB.

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[2] References are made to the Code of Federal Regulations in effect at the time of the Pacific First conversion.

[3] Other than a preferential right to buy stock at the same price at which it is subsequently offered to the general public, an institution's depositors receive nothing in compensation for their "ownership" interests.

To assure that full value is received, the FHLBB requires that all stock not sold during the "Subscription Offering" phase (in which the depositors participate) be sold in a subsequent "Public Offering" (in which the general investing public may participate). *Id.* at § 563b.3(c)(6). All stock must be sold at the same price per share, *id.* at §§ 563b.3(c)(10), 563b.7; accordingly, while existing depositors are granted preferential rights to acquire stock, they cannot capitalize upon an increase in the value of the institution between the time they subscribe and the actual time of the conversion. In practice, because the market value of the institution can fluctuate significantly during the conversion process—often as a result of changes in the market for thrift securities—the FHLBB requires an updated appraisal immediately before the onset of the Public Offering.[4] In order to reflect any intervening change in market value, the institution must alter either the proposed total number of shares to be sold or the proposed price per share, or both. *Id.* at § 563b.3(c)(1). Thus, under the FHLBB's regulatory structure, as disclosed in the Pacific First offering materials, purchasers during the Subscription Offering phase, in exercising their preferential rights, were required to commit to invest their money without knowing the precise price per share, the precise number of shares to be offered or—necessarily—the exact percentage of ownership in the institution the shares they purchased would represent after the conversion. *Id.* at § 563b.7(g)(3), (5).

Pacific First retained an experienced appraiser, Kaplan, Smith & Associates, Inc. ("Kaplan, Smith"),[5] to perform the independent appraisal required by the FHLBB. Kaplan, Smith's first appraisal report was issued in March 1983. As required by FHLBB regulations, Kaplan, Smith updated the appraisal prior to the onset of the Subscription Offering phase. Thereafter, in June 1983, the FHLBB authorized Pacific First to proceed with the Subscription Offering phase of the conversion

[4] *See, e.g.*, FHLBB, *Guidelines For Appraisal Reports For The Valuation Of Savings & Loan Associations And Savings Banks Converting From Mutual To Stock Form Of Organization* (Revised October 1983) at 9.

[5] During 1983 and 1984, Kaplan Smith provided appraisal services for more than half of the major public offerings of thrift institution stock.

at an aggregate price within the updated valuation range. The FHLBB also approved Pacific First's stock offering materials, which had been submitted to the FHLBB for review as part of the application process. On June 15, 1983, Pacific First distributed the Subscription Offering Circular to eligible members of the association, offering 5,800,000 shares of common stock at a "maximum subscription price" of $17.00 per share.

Pursuant to FHLBB requirements, Kaplan, Smith again updated its appraisal prior to the onset of the Public Offering. Largely as a result of changing market conditions which had increased the market value of thrift stocks generally, and a market that had proved very receptive to the Pacific First offering, the estimated market value of Pacific First had continued to increase. Pacific First submitted the update to the FHLBB and sought approval to amend its application for conversion to reflect the new valuation range, so that increased capital would be realized by increasing the number of shares to be sold. On July 19, 1983, the FHLBB gave its final approval and authorized Pacific First to sell the conversion stock in accordance with the amendment. Although the FHLBB had the authority to do so, *see* 12 C.F.R. § 563b.7(g)(3), in its discretion it did not require Pacific First to resolicit those who had committed to purchase stock in the Subscription Offering. Pacific First thereafter commenced the Public Offering phase of the conversion. Upon completion, a total of 7,480,000 shares of stock—the full number authorized by the FHLBB—were issued and sold at the price authorized and approved by the FHLBB.

In February 1985, the respondents filed a "Complaint for Securities Law Violation" in the United States District Court for the District of Oregon. The gravamen of their complaint was dissatisfaction with the valuation of the stock, the increase in the number of shares ultimately sold, and their not having been afforded an opportunity to modify or rescind their subscription phase orders in response to the increase. Although respondents cast their complaint in terms of alleged misrepresentations and omissions in the offering circular, the District Court, having before it FHLBB-certified copies of the offering materials, found that the complaint "amounts to no more than a challenge

to the conversion process as approved by the FHLBB," as to which Congress had vested jurisdiction exclusively in the courts of appeals (22a). Thus, refusing to read the complaint in a manner which would allow plaintiffs to "circumvent that exclusive review," *id.*, the District Court dismissed the action.

On appeal, the Ninth Circuit reversed. The Court of Appeals determined that the District Court had subject matter jurisdiction because, on the face of their complaint, the plaintiffs *purport* to allege violations of the federal securities laws (8a). Leaving open the issue whether the complaint truly was a sham (as the District Court had found), the Court of Appeals reasoned that Congress, while expressly vesting review jurisdiction exclusively in the courts of appeals, did not thereby "repeal" the remedies available under the federal securities law (5a). As evidence of this proposition, the Court of Appeals relied upon 12 U.S.C. § 1730a(l), *id.*, a provision which deals with bank holding companies and has no relationship to thrift conversions,[6] and upon its own view that the 30-day review period specified by Congress is "patently unreasonable" (8a). Finally, the Court of Appeals determined, as a procedural matter, that the District Court should not have dismissed for lack of subject matter jurisdiction since, in its view, any argument that the complaint constitutes only an attack upon the conversion, an issue not reached by the Court of Appeals, "should be addressed to the district court as an argument on the merits, not on jurisdiction" (11a).

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[6] The authority for conversions is contained in 12 U.S.C. § 1464(i) (1982) and 12 U.S.C. § 1725(j) (1982), each of which incorporate the procedure set forth in subsection (k) of section 1730a of title 12. Section 1730a, however, as its title indicates, deals with the regulation of bank holding companies. Subsection (l) of 1730a, relied upon by the Ninth Circuit, states that "[n]othing contained in *this section* . . . shall be interpreted or construed as approving any . . . violation of existing law. . . " (emphasis added), plainly referring to section 1730a. While the conversion statutes incorporate the procedures set forth in subsection (k), they do not incorporate subsection (l) or any other substantive portion of 1730a. Moreover, plaintiffs' complaint is precluded by the conversion statutes, not section 1730a, and the "savings" provision of subsection (l) is thus irrelevant. Nor does (l) address what *remedies* are available for "violation[s] of existing law."

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S DECISION THREATENS TO INTERFERE WITH DIFFICULT QUESTIONS CONCERNING THE VALUATION OF A FEDERALLY-CHARTERED INSTITUTION, A MATTER CONGRESS HAS ENTRUSTED TO THE FHLBB, SUBJECT TO REVIEW ONLY IN A COURT OF APPEALS, AND PRESENTS SIGNIFICANT ISSUES OF NATIONAL IMPORTANCE

Approximately 470 federal associations nationwide have converted from mutual to stock form over the past ten years under the strict supervision of the FHLBB. The trend to conversion from mutual to stock form is continuing apace. The FHLBB actively encourages these conversions since they represent the "major means of building the net worth needed to protect the thrift industry from future adversity." 49 Fed. Reg. 19,000 (May 4, 1984). The industry has been hard hit in the past and, along with the federal insurance program that supports it, has been under tremendous strain.

Congress created the federal thrift industry, and an associated program of federal insurance, in 1933, as part of a package of Depression-era reforms which it hoped would instill renewed confidence in the nation's financial institutions. Congress vested the then newly-created FHLBB with exclusive and extensive authority to charter, supervise and regulate the industry and insurance program. Indeed, as this Court has recognized, the FHLBB's complex oversight scheme governs "the powers and operations of every Federal savings and loan association from its cradle to its corporate grave." *Fidelity Federal Savings and Loan Ass'n* v. *de la Cuesta,* 458 U.S. 141, 145 (1982) (quoting *People* v. *Coast Federal Savings and Loan Ass'n,* 98 F. Supp. 311, 316 (S.D. Cal. 1951)). The pervasive aspect of the FHLBB's control has also been recognized by the Ninth Circuit. *Meyers* v. *Beverly Hills Federal Savings and Loan Ass'n,* 499 F.2d 1145, 1147 (9th Cir. 1974). Nevertheless, the Ninth Circuit's decision in this case would interfere with the FHLBB's power to maximize the infusion of new capital into the industry at a time when these efforts are most needed.

Although Congress' original intention was to create an industry of "local *mutual* thrift institutions in which people may invest their funds and . . . to provide for the financing of homes," Home Owners Loan Act, ch. 64, § 5(a), 48 Stat. 128, 132 (1933) (emphasis added), in 1948 Congress enacted legislation which authorized federal associations to convert to *state* stock associations.[7] In response to a substantial exodus of federal institutions, however, the FHLBB, in 1955, imposed the first of a series of administrative moratoria on such conversions. In 1973, Congress imposed a *statutory* moratorium, the only exception to which was a limited number of test cases under the close supervision of the FHLBB to enable the FHLBB to develop greater expertise and an appropriate overall approach to conversions.[8]

In October 1974, after the FHLBB published its first definitive set of conversion regulations,[9] Congress again authorized the FHLBB to approve conversions of federal institutions from mutual to stock form, although only in limited cases.[10] Congress further provided, however, that jurisdiction to review the FHLBB's activity would be vested exclusively in the United States Courts of Appeals.[11] Few conversions occurred during the period immediately following this authorization.

In the late 1970's the financial health of the industry rapidly declined, primarily as a result of sharply-rising interest rates. While the industry was locked into long-term mortgages at low interest rates, new funds could only be obtained at record-high rates; the resulting disparity threatened the capital

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[7] Act of July 3, 1948, ch.825, 1, 62 Stat. 1239; *see generally* 12 U.S.C. § 1464(i) (1982).

[8] Act of Aug. 16, 1973, Pub. L. No. 93-100, § 4, 87 Stat. 343 (codified as amended at 12 U.S.C. § 1725(j) (1976)); *see also* 12 U.S.C. § 1725(j) (1982).

[9] *See* 39 Fed. Reg. 9,142 (Mar. 7, 1974).

[10] Act of Oct. 28, 1974, Pub. L. No. 93-495, § 105(d), 88 Stat. 1504 (codified at 12 U.S.C. § 1725(j) (1976)).

[11] *Id. See* 12 U.S.C. § 1725(j)(4) (1976); 12 U.S.C. § 1725(j)(2) (1982).

structure of the entire industry and the federal insurance program which stood behind it.[12] Although the FHLBB implemented several regulatory changes designed to provide some relief, it saw conversions as a primary way of infusing sorely-needed capital into the system. In 1982, Congress broadened the FHLBB's authority to approve federal mutual-to-stock conversions, subject to FHLBB rules and regulations.[13] And, Congress again provided that jurisdiction to review challenges to such conversions, or the terms or conditions thereof, would be vested exclusively in the courts of appeals.[14]

The FHLBB's control over conversions obviously is an integral part of the entire regulatory and insurance structure which Congress entrusted to the FHLBB. As envisioned by Congress, the FHLBB has developed enormous experience over five decades: it has a unique understanding of industry problems, as well as (by virtue of its extensive examination powers) an intimate knowledge of the financial condition of each individual institution it regulates, and it has an exclusive Congressional mandate to oversee a Congressionally-created industry. As part and parcel of such oversight, the FHLBB is authorized to approve conversions on such terms and conditions as are informed by its experience, expertise and judgment.[15] Although Congress expressly placed conversions within the plenary control of the FHLBB, the Ninth Circuit's decision would make the FHLBB's final determination subject to subsequent modification in district courts throughout the country. Congress sought to protect against this possibility by expressly restricting the ability of the federal courts to review and modify the conversion-related determinations of the FHLBB to a period when the entire conversion can be reviewed

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[12] *See, e.g., Competition and Conditions in the Financial System: Hearings Before the Committee on Banking, Housing and Urban Affairs, United States Senate*, 97th Cong., 1st Sess (1981); H.R. Rep. 899, 97th Cong., 2d Sess. 87-89 (1982) (Garn-St. Germain Depository Institutions Act of 1982, Conference Report).

[13] Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469.

[14] *Id.*, § 313, 96 Stat. 1498 (codified at 12 U.S.C. § 1464(i)-(1982)).

[15] *See, e.g.*, S. Rep. No. 902, 93d Cong., 2d. Sess., *reprinted in*, 1974 U.S. Code Cong. & Ad. News 6119, 6122.

and a decision made as to whether or not to permit the conversion to proceed on the basis approved by the FHLBB.

By framing their complaint as a claim under the federal securities laws, respondents, with the approval of the Ninth Circuit, would upset this Congressional design. Dissatisfied depositor-investors could attack one important aspect of conversions—the value placed upon the institution, which in turn determines the price per share—in any district court in the nation simply by claiming "securities fraud." Such actions present a threat to the capital structure and stability of converted institutions, both in terms of the cost of litigation and, more so, the impact any adverse judgment might have, possibly years after the conversion, upon the financial structure of the institution. In fact, to the extent an adverse judgment would require the institution either to redeem its stock for the amount received in the conversion or, through an award of damages, reduce the purchase price thereof, the result would be contrary to FHLBB regulations prohibiting such redemptions and would effectively supplant the FHLBB's expert judgment and authority to dictate the terms and conditions of a conversion, including the aggregate purchase price of conversion stock.[16]

By channeling all conversion challenges into federal appellate courts, and by requiring all claims to be quickly asserted, Congress rationally sought to eliminate unrestrained interference with the regulatory structure and thus provide a measure of assurance that federal thrift institutions which undergo a conversion would not be subjected to destabilizing collateral attacks in private damage actions. In *Whitney National Bank* v. *Bank of New Orleans*, 379 U.S. 411, 419-23 (1965) this Court rejected any "notion that the [Federal Reserve] Board's determination may be collaterally attacked in the District Court." 379 U.S. at 421-22. As the Court observed in language apropos to this case, "the statutory review procedure set out in the Act must be utilized by those dissatisfied with the Board's

[16] For example, section 12(2) of the Securities Act of 1933 authorizes rescission as a remedy for violations thereof. This remedy would be directly contrary to FHLBB regulations prohibiting Pacific First from repurchasing its stock, except under circumstances not relevant here. *See* 12 C.F.R. § 563b.3(g)(1) (1983).

ruling . . . otherwise the commands of the Congress would be completely frustrated." 379 U.S. at 432. This Court's review is needed to ensure that Congress' express will is enforced with respect to conversions from the mutual to the stock form of ownership.[17]

II. THE NINTH CIRCUIT'S DECISION ESTABLISHES A DIRECT CONFLICT WITH THE TENTH AND ELEVENTH CIRCUITS ON AN ISSUE OF NATIONAL SIGNIFICANCE

The Ninth Circuit's decision also is in direct conflict with decisions of the Tenth and Eleventh Circuits, where similar attempts by would-be "securities law" plaintiffs to avoid the Congressionally-mandated review limitations by elevating form over substance have been rejected. *Craft* v. *Florida Federal Savings & Loan Ass'n,* 786 F.2d 1546 (11th Cir. 1986); *Harr* v. *Prudential Federal Savings & Loan Ass'n,* 557 F.2d 751 (10th Cir. 1977), *cert. denied,* 434 U.S 1033 (1978). In *Craft,* the Eleventh Circuit concluded that the plaintiffs' allegations of securities fraud were merely an attempt to avoid the exclusive review provision laid down by Congress and thus held that the district court "was without subject matter jurisdiction" to entertain the case. *Craft,* 786 F.2d at 1554. As in this case, the plaintiffs in *Craft* alleged "reliance" upon a Subscription Offering Circular which "failed to disclose" material facts about a "subsequent offering" (i.e., the Public Offering) of stock. Indeed, the alleged "nondisclosures" in the two complaints are virtually identical, relating to the alleged effect of increasing the

[17] In its decision, the Court of Appeals pointed out that FHLBB regulations preclude a converting institution from representing to investors either that the shares offered have been approved or disapproved, or that the accuracy of the statements made in the offering materials have been "passed on" by the agency (7a). While the agency's reluctance to permit itself to be cited in connection with the efforts of a converting institution to sell its stock is understandable, the prohibition against such representations does not change the fact (as the FHLBB's regulations reflect) that the FHLBB does prescribe what factors are to be taken into account in connection with the appraisal, and thus how the aggregate offering price is to be set, or the fact that the agency does review the appraisal in determining whether to approve an application to convert. *See* 12 CFR § 563b.7(d), (f).

number of shares between the Subscription Offering phase and the Public Offering phase of the respective conversions and to the fair market value of the stock.

While the Ninth Circuit sought to distinguish *Craft* by noting the Eleventh Circuit's characterization of that action as involving only "bare bones allegations" of securities fraud (10a), it is significant that the Eleventh Circuit did not grant plaintiffs in *Craft* leave to replead with specificity which, under the Ninth Circuit's analysis, should have been granted. In reality, the two cases are not meaningfully distinguishable; they are in direct conflict.

The Ninth Circuit's opinion also conflicts with the decision in *Harr*. In *Harr*, as in this case, the district court had dismissed for lack of subject matter jurisdiction an action which, although styled as an action under the securities laws, was determined to amount to a challenge to the terms of a mutual to stock conversion approved by the FHLBB. The Tenth Circuit affirmed:

> [W]e must hold that the cause of action, no matter how otherwise described, must in the first instance be a challenge to the approval by the Bank Board of the plan of conversion, and the consideration of the proxy materials. It is "The Plan" itself which is the real basis for the arguments advanced here by plaintiffs. The attempted reliance on Rule 10b-5 is at best a secondary or derivative position.
>
> • • •
>
> It does not make much difference whether this is called an exhaustion of administrative remedies, or whether it is viewed as what in reality is a challenge to the Bank Board's decision although cast in terms of Rule 10b-5. The consequences are the same, and we must affirm the trial court. The subject matter, the nature of plaintiffs' claim, and the arguments before this court demonstrate the relief sought can only be afforded by a challenge to the Bank Board's action as the basic decision and authorization for the acts and consequences complained of.

557 F.2d at 753-54. *Accord York* v. *Federal Home Loan Bank Board,* 624 F.2d 495, 497 n.2 (4th Cir.), *cert. denied,* 449 U.S. 1043 (1980).

The Ninth Circuit purported to distinguish *Harr* on the basis that the plaintiffs in *Harr* did not claim that they were induced to purchase stock in reliance on fraudulent representations made in a stock offering circular (9a). As the District Court recognized in this case (21a), however, the distinction is irrelevant since, in both cases, plaintiffs were depositor/members of the institution prior to the conversion and were essentially challenging, under the securities laws, the value of what they had received as a result of a FHLBB approved conversion. *See Harr* v. *Federal Home Loan Bank Board,* 557 F.2d 747, 749 (10th Cir. 1977), *cert. denied,* 434 U.S. 1033 (1978).

The Ninth Circuit's decision conflicts with *Craft* and *Harr* not only on the substantive issue but also as to the procedural point raised by the Court of Appeals. The Ninth Circuit ruled that any argument that the complaint, while clothed in the language of the securities laws, truly "constitute[s] an attack on the conversion," should be addressed to the District Court "as an argument on the merits, not on jurisdiction" (11a). Neither the Eleventh Circuit in *Craft,* nor the Tenth Circuit in *Harr,* ruled that such an argument is properly addressed only to the "merits" of the purported securities laws violations, and both decisions involved dismissals for lack of subject matter jurisdiction.

Moreover, in light of Congress' express pronouncement that jurisdiction over such challenges is to be vested exclusively in the courts of appeals, an analysis of the basis for the relief sought in the complaint *should* be directed towards a motion to dismiss for lack of subject matter jurisdiction. Such dismissal is appropriate where the alleged claim under the federal statutes "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction . . . ." *Bell* v. *Hood,* 327 U.S. 678, 682 (1946). In this regard, the District Court found that the "securities fraud" complaint in this case "amounts to no

more than a challenge to the conversion process as approved by the FHLBB." The Ninth Circuit erred in determining that it need not reach this issue on a motion to dismiss for lack of subject matter jurisdiction.

III. THE NINTH CIRCUIT'S DECISION AUTHORIZES AN UNWARRANTED EXTENSION OF JURISDICTION BASED UPON IMPLIED REMEDIES UNDER THE FEDERAL SECURITIES LAWS, IN THE FACE OF AN EXPRESS PROHIBITION AGAINST SUCH JURISDICTION

The conversion-related statutes expressly provide for exclusive jurisdiction, in a court of appeals, of any challenge to the terms and conditions of a conversion. 12 U.S.C. §§ 1464(i)(4), 1725(j)(2) (1982). In determining whether plaintiff's "securities law" action could proceed in a district court, the Ninth Circuit undertook to determine whether the exclusive review statutes divest district courts of jurisdiction over securities law violations (5a-6a). The Ninth Circuit found no express language exempting conversion stock from the securities laws nor evidence of an implied "repeal." This bootstrap analysis would unreasonably require Congress to expressly "repeal" judicially-created remedies under the securities laws, even though Congress broadly and expressly spoke on the issue of jurisdiction over challenges of any kind to the terms and conditions of conversions.

Plaintiffs purport to allege claims, *inter alia,* under section 10(b) of the Securities Exchange Act of 1934 and section 17(a) of the Securities Act of 1933. However, any remedies available under those sections have been *judicially* created. *See Herman & MacLean* v. *Huddleston,* 459 U.S. 375, 380 and nn. 9-10 (1983). It was thus inappropriate for the Court of Appeals to look for an express or implied "repeal" of judicially *implied* rights of action under the securities laws. *Cf. Dean Witter Reynolds, Inc.* v. *Byrd,* 470 U.S. 213, 84 L.Ed.2d 158, 167-168, (1985) (White, J., concurring) ("[S]olicitude for the federal cause of action—the 'special right' established by Congress-. . .—is not necessarily appropriate where the cause of action is judicially implied . . ."). The Ninth Circuit's conclusion that

plaintiffs could invoke jurisdiction under implied remedies of the securities laws, unless petitioners could establish that Congress, by expressly providing that plaintiff's challenge to the conversion could only be brought in a court of appeals, thereby "repealed" these remedies, placed an unreasonable burden on petitioners.

Indeed, as this Court has indicated on several occasions, it is the obligation of the *judicial* branch to place appropriate limitations on the availability of implied remedies under the securities laws. Such remedies are particularly inappropriate where, as in this case, Congress has provided for a comprehensive federal scheme of regulation which would be displaced by private damage remedies. In *Marine Bank* v. *Weaver,* 455 U.S. 551 (1982), for example, the Court held that section 10(b) did not provide a remedy to persons allegedly defrauded in connection with the purchase or sale of a certificate of deposit issued by a federally insured and regulated bank, in part because a comprehensive federal regulatory scheme governing the industry already existed. Citing *International Brotherhood of Teamsters* v. *Daniel,* 439 U.S. 551 (1979), in which the Court held that a pension plan regulated by the Employee Retirement Income Security Act of 1974 (ERISA) similarly was not subject to the additional remedies of the securities laws, the Court in *Marine Bank* noted:

> Since ERISA regulates the substantive terms of pension plans, and also requires certain disclosures, it was unnecessary to subject pension plans to the requirements of the federal securities laws as well.

455 U.S. at 555 n.7.

The obligation of the judicial branch to limit the availability of judicially-created remedies is even more urgent in this case since, in addition to providing a comprehensive regulatory scheme, Congress has expressly precluded the District Court's jurisdiction with respect to conversion challenges. 12 U.S.C. §§ 1464(i)(4) and 1725(j)(2). Where a statute expressly restricting subject matter jurisdiction conflicts with a judicially-created cause of action, the federal statute must prevail.

The Ninth Circuit's decision would allow the District Court to exercise jurisdiction in the face of an express statute intended to restrict its jurisdiction. Review by this Court is required to protect against an extension of subject matter jurisdiction unauthorized by Congress.[18]

[18] The Ninth Circuit also deferred to the views expressed by the Securities and Exchange Commission (SEC), as *amicus curiae*, that "there can be no question that the antifraud provisions of the federal securities laws protect defrauded purchasers of stock issued by [savings] institutions" (6a). With all due respect, the SEC's opinion is of little value since the SEC has no "mandate to interpret" the conversion statutes (7a). Moreover, the SEC's opinion is suspect since it "represents an attempt by one federal agency to reallocate, on its own initiative, the regulatory responsibilities Congress has purposefully divided among several different agencies .... The SEC by itself cannot extend its jurisdiction over institutions expressly entrusted to the oversight of ... others." *American Bankers Association* v. *SEC*, No. 85-6055, slip op. at 35-36 (D.C. Cir. Nov. 4, 1986).

CONCLUSION

For the reasons discussed above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

/s/ JAMES H. SCHROPP

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Dated: December 8, 1986

FOR PUBLICATION

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 85-3946

WAYNE C. REMBOLD and KAREN D. REMBOLD, DARRELL STEELE, and LYLE SCHNEIDER,
Plaintiff-Appellants,

vs.

PACIFIC FIRST FEDERAL SAVINGS BANK, a federally chartered stock savings bank in the State of Washington, PRICE WATERHOUSE & CO., a partnership, and KAPLAN SMITH & ASSOCIATES, INC., a Washington, D.C. corporation,
Defendants-Appellees.

D.C. No.
CV 85-224-FR

OPINION

Appeal from the United States District Court
for the District of Oregon
Helen J. Frye, District Judge, Presiding

Argued and submitted May 9, 1986
Portland, Oregon

Before: ALARCON, REINHARDT, and THOMPSON, Circuit Judges.

ALARCON, Circuit Judge:

Appellants Wayne C. Rembold and Karen D. Rembold (hereinafter the Rembolds), appeal from the district court's order dismissing their complaint against Pacific First Federal Savings Bank (hereinafter Pacific First) for lack of subject matter jurisdiction. Because the Rembolds alleged violations of federal securities laws, state securities statutes, and common law fraud and negligence, the district court had subject matter jurisdiction over this matter.

We review the dismissal of a complaint for lack of subject matter jurisdiction as a pure question of law reviewable *de novo*. *Hoohuli v. Ariyoshi,* 741 F.2d 1169, 1173 (9th Cir. 1984); *Miller v. Oregon Liquor Control Commission,* 688 F.2d 1222, 1223 (9th Cir. 1982).

We construe the allegations of the complaint in favor of the pleader. *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974).

I. PERTINENT PROCEDURAL AND FACTUAL BACKGROUND

Prior to 1983, Pacific First was a mutual savings bank owned by its depositors. In April, 1983, the board of directors submitted an application to the Federal Home Loan Bank Board (hereinafter FHLBB) for conversion of Pacific First from a mutual to a stock form of organization. The FHLBB approved Pacific First's application for conversion on June 13, 1983.

On June 15, 1983, Pacific First offered its depositors preferential rights to purchase 5,800,000 shares of conversion stock in a Subscription Offering Circular. The Rembolds purchased 328,726 shares of stock in Pacific First on or about July 16, 1983. They allege that they relied upon representations contained in the Subscription Offering Circular in purchasing shares.

The FHLBB regulations governing conversions to stock ownership require the preparation of a Subscription Offering

Circular. 12 C.F.R. § 563b.7. The offer to sell securities may not be made prior to approval of the application for conversion. *Id.* Copies of the preliminary and final offering circulars must be filed with the FHLBB. 12 C.F.R. § 563b.8(3). No representation may be made in the offering circular that "price information has been approved . . . or that the shares of capital stock sold pursuant to the plan of conversion have been approved or disapproved by the Federal Home Loan Bank Board . . . or that the Board . . . has passed upon the accuracy or adequacy of any offering circular covering such shares." 12 C.F.R. § 563b.7(d). Pacific First filed the Subscription Offering Circular as part of the application for conversion.

Price, Waterhouse and Company (hereinafter Price, Waterhouse) certified the financial statements in the circular. Kaplan, Smith and Associates, Inc. (hereinafter Kaplan, Smith) independently appraised the stock.

On February 5, 1985, the Rembolds filed this action against Pacific First, Price, Waterhouse, and Kaplan, Smith (hereinafter appellees) alleging that the Subscription Offering Circular contained fraudulent representations. The Rembolds alleged violations of the 1933 Securities Act, § 12(2), 15 U.S.C. § 771(2), and § 17a, 15 U.S.C. § 77(q)a, violations of the 1934 Securities Exchange Act § 10b, 15 U.S.C. § 78j(b), violations of Oregon and Washington state securities laws, common law fraud, and negligence. In particular, they alleged that the Subscription Offering Circular contained misrepresentations which overstated the value of Pacific First's assets in real estate and in its loan portfolio. The Rembolds also alleged that the Subscription Offering Circular contained false projections of the future earnings of Pacific First, and that it failed to disclose information regarding management strategies which would result in short term losses, and information about the magnitude, timing, and effect of a second stock offering.

The defendants filed motions to dismiss on ten separate grounds including lack of subject matter jurisdiction, failure to state a claim for relief, and failure to plead with specificity as required by Fed. R. Civ. P. 9(b). In its written Order and Opinion, the district court, after reciting each of the discrete challenges to the complaint, held that "it need only address the

issue of subject matter jurisdiction." The district court concluded that:

> [P]laintiffs' challenge to the Subscription Offering Circular and to the issuing of subsequent offerings amounts to no more than a challenge to the conversion process as approved by the FHLBB. Congress has chosen to vest review of such action exclusively in the Court of Appeals and this court will not read this complaint to circumvent that exclusive review.

It is clear from the quoted language that the district court declined to consider the merits of any of the plaintiffs' claims because of its view that it lacked jurisdiction to consider a challenge to an allegedly fraudulent and negligent stock offering made after approval of a bank conversion by the FHLBB.

II. DISCUSSION

We must decide whether in enacting the National Housing Act, 12 U.S.C. §§ 1725(j)(2) and 1730a(k), Congress intended to deprive a district court of the jurisdiction to hear common law and federal and state securities law violations in a stock offering issued after the conversion of a mutual bank to stock form of organization.

The National Housing Act of 1934, 12 U.S.C. § 1725(j), allows a mutually owned and federally regulated savings institution to convert to a stock form of ownership. Section 1725(j) provides as follows:

> (1) Except as provided in section 1464 of this title, no insured institution may convert from the mutual to stock form except in accordance with the rules and regulations of the Corporation.
>
> (2) Any aggrieved person may obtain review of a final action of the Federal Home Loan Bank Board or the Corporation which approves, with or without conditions, or disapproves a plan of conversion

> pursuant to this subsection only by complying with the provisions of subsection (k) of section 1730a of this title within the time limit and in the manner therein prescribed . . . .

Section 1730a(k) of the National Housing Act authorizes judicial review of an order approving or disapproving a conversion plan. Section 1730a(k) provides in pertinent part as follows:

> Any party aggrieved by an order of the Corporation under this section may obtain a review of such order by filing in the court of appeals of the United States . . . within thrity days after the date of service of such order, a written petition praying that the order of the Corporation be modified, terminated, or set aside . . . .

A. The National Housing Act Did Not Divest The District Court of Jurisdiction Over Securities Law Violations

The anti-fraud provisions of the 1934 Securities Exchange Act apply to the sale of stock by a savings and loan association. *Tcherepnin v. Knight,* 389 U.S. 332, 340-42 (1967). The National Housing Act does not contain any language creating an exception from the federal securities laws for stock issued as the result of a bank conversion. Instead, Congress expressed its intention *not* to repeal any law prohibiting any conduct in connection with an application for a bank conversion of the National Housing Act, 12 U.S.C. § 1730a(1). Section 1730a(1) provides in pertinent part that: "[n]othing contained in this section . . . shall be interpreted or construed as approving any- . . . violation of existing law . . . ." We believe that the plain meaning of these words is that in passing the National Housing Act Congress did not intend to preclude any existing cause of action under the antifraud sections of the securities acts or any other law.

The National Housing Act does not contain an implicit exception to the antifraud securities law under the National Housing Act. In general, implicit repeal is not favored.

Tennessee Valley Authority v. Hill, 437 U.S. 153, 189 (1978); *Morton v. Mancari,* 417 U.S. 535, 549 (1974). If repeal is to be inferred, there must be actual Congressional intent to do so, which is "clear and manifest." *Posadas v. National City Bank,* 296 U.S. 497, 503 (1936); *see also Amalgamated Transit Union v. Metropolitan Atlanta Rapid Transit Authority,* 667 F.2d 1327, 1334 (11th Cir. 1982) (holding that if "clear evidence of affirmative congressional intent is lacking, we cannot infer that Congress has legislated silently."). In this case, Congress has expressed the intent *not* to except bank conversion securities from the protective provisions of existing securities laws.

In the absence of clear Congressional intention, implied repeal must be based on the fact that the statutes at issue are irreconcilable, *Morton,* 417 U.S. at 550, or there is "plain repugnance" between them. *Gordon v. New York Stock Exchange,* 422 U.S. 659, 682-83 (1975). We can find no incompatibility between the anti-fraud provisions of securities laws and the National Housing Act. Both statutes protect shareholders who purchase stock in a savings institution from violations of the law.

Our construction of the National Housing Act is shared by the Securities Exchange Commission and apparently by the FHLBB. In a comment to amendments adopted to 12 C.F.R. Parts 536b, 563c, and 563d, the Board opined as follows:

> In addition, it is desireable, and as regards the Board's 1934 Act regulations, promoted by statute, that the Board's disclosure regulations approximate those of the SEC because (1) the antifraud provision of the federal securities laws are applicable to all offers for sale of securities, assuming the use of jurisdictional means . . . .

48 Fed. Reg. 31,614, 31,615 (July 11, 1983).

In its amicus curiae brief in this matter, the Securities and Exchange Commission argues that "there can be no question that the antifraud provisions of the federal securities laws protect defrauded purchasers of stock issued by such institutions." The Securities and Exchange Commission also notes

that "[n]othing in the statutory scheme governing conversions divests jurisdiction under the securities laws for claims alleging fraud in a sale of stock by converting institution."

Under the principle of deference to administrative interpretations, we must defer to an agency's construction of the statutes it has been mandated to interpret unless that construction would not have been sanctioned by Congress. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984).

The Commission's conclusions are also supported by an analysis of the relevant statutes. Section 1730a(k) is limited by its terms to the right to review by a party aggrieved by an "order" of the FHLBB approving or disapproving a conversion plan. 12 U.S.C. § 1730a(k). The action is directed against the FHLBB. The relief provided by section 1730a(k) is limited to the modification, termination, or the setting aside of the order. The statute makes no reference to the right to maintain a private cause of action against the savings institution by a person who has suffered damages as the result of misrepresentations in a *stock offering circular*. In fact, the FHLBB disclaims responsibility for the accuracy of any information contained in offering circulars. 12 C.F.R. § 563b.7(d). In the face of such disclaimer, an order approving an application of a conversion plan does not relate in any way to the right of the purchaser of stock to seek damages against the savings institution for any misrepresentations in the offering circular.

The offering circular issued by Pacific First in this matter contained the following notice:

> THESE SHARES HAVE NOT BEEN APPROVED OR DISAPPROVED BY THE FEDERAL HOME LOAN BANK BOARD OR THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION NOR HAS SUCH BOARD OF CORPORATION PASSED ON THE ACCURACY OR ADEQUACY OF THIS SUBSCRIPTION OFFERING CIRCULAR. ANY REPRESENTATION TO THE CONTRARY IS UNLAWFUL.

This notice advised the Rembolds and other prospective shareholders that the FHLBB did not consider the representations contained in the stock offering circular in approving the conversion plan. Under such circumstances, a challenge in this court of the order approving the conversion plan on the ground that the savings institutions made fraudulent statements in the offering circular would appear to be futile. We would expect that the record of the proceedings before the FHLBB would be silent concerning the accuracy of any representations in the stock offering circular.

In addition, the construction of section 1730a(k) suggested by the appellees would lead to an unreasonable and unjust result. Section 1730a(k) requires that a person aggrieved by an order approving or disapproving a conversion plan file for review in this court within 30 days. A 30 day limitations period to discover the existence of fraud in a stock offering is patently unreasonable especially in those situations where the stock sale may not occur until after the deadline has expired. Whenever possible, statutes should be interpreted to avoid unreasonable results. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982). We are confident that had Congress intended to make such a radical change in the statute of limitations for an action based on fraudulent representations it would have provided us with an unmistakable expression of its purpose.

We conclude that the enactment of section 1730a(k) did not divest the district court of subject matter jurisdiction over a stockholder's private cause of action against a savings institution based upon alleged misrepresentations in a stock offering circular issued following FHLBB approval of a conversion plan.

B. The Complaint Purports To Assert A Securities Law Violations

In determining that it lacked subject matter jurisdiction, the district court relied solely on the decision of the Tenth Circuit in *Harr v. Prudential Federal Savings & Loan Association*, 557 F.2d 751 (10th Cir. 1977), *cert. denied*, 434 U.S. 1033 (1978). There are critical factors that distinguish *Harr* from the matter before this court.

In *Harr*, the plaintiffs were depositors in a mutual savings institution. They received free stock following the bank's conversion to a stock form of ownership. The plaintiffs filed two actions in which they asserted that the proxy materials filed in support of the application for conversion were fraudulent. The plaintiffs sought review of the order approving the plan in an action against the FHLBB filed in the Court of Appeals for the Tenth Circuit. The decision in this matter is reported in *Harr v. Federal Home Loan Bank Board*, 557 F.2d 747 (10th Cir. 1977), *cert. denied*, 434 U.S. 1033 (1978). In this action the plaintiffs alleged, *inter alia*, that the proxy solicitation material was "misleading and false." *Id.* at 749. The *Harr* plaintiffs also filed an action against the savings institution in the district court. There they claimed that the conversion plan was "unfair and itself deceptive" which violated their rights under Rule 10b-5 of the Securities Exchange Commission. *Harr v. Prudential Federal Savings*, 557 F.2d 752.

The Tenth Circuit's opinions in each matter were written by the same circuit judge and decided on the same date. The Tenth Circuit concluded that the complaint filed in the district court was "directed to matters which are part and parcel of the plan of conversion approved by the Board." *Harr v. Prudential Federal Savings*, 557 F.2d at 754. The court explained its decision as follows:

> The subject matter, the nature of plaintiffs' claim, and the arguments before this court demonstrate that the relief sought can only be afforded by a challenge to the Bank Board's action as the basic decision and authorization for the acts and consequences complained of.

Id. at 754.

In *Harr* no claim was made, as in the instant matter, that fraudulent and negligent representations were made in a stock offering circular. No allegation was made that the plaintiffs suffered monetary losses because they were induced to purchase stock in reliance on fraudulent representations. Instead, the primary objective of the plaintiffs in *Harr* was to set aside, or

terminate the order because of deceptive fraud in the plan for conversion. The Tenth Circuit did not suggest that the National Housing Act precludes a private cause of action against a savings institution based on fraudulent representations in an offering circular. This issue was not before the court in *Harr*.

After the briefs were submitted in this matter, appellees furnished this court with a copy of the decision of the Eleventh Circuit in *Craft v. Florida Federal Savings & Loan Association*, 786 F.2d 1546 (11th Cir. 1986). The *Craft* case does not assist us in our task. The Eleventh Circuit was not presented with the question we must decide. The court in *Craft* reviewed the complaint and concluded as follows:

> We view the Crafts' anti-fraud claims as bare bones allegations made to escape the exclusive review provisions of the Review Statutes. They do not allege any false or misleading statements. The allegations concerning Kidder's final appraisal are conclusory and fail to show that they made any purchases in reliance on it. Kidder is not named as a defendant in this action. All of the claims derive from Crafts' basic contention that they were entitled by the Bank Board's regulations to be restricted after the Bank Board approved the updated appraisal and the issuance of additional conversion stock.

Id. at 1554.

Unlike the complaint before the court in *Craft*, the Rembolds' claims contain more than "bare bones allegations" of fraud. They allege that they acted in reliance on false representations in making purchases of stock. They have named the appraisers as a party. They did not base their complaint on an alleged violation of any regulation of the FHLBB regarding the approval of a conversion plan. Instead, the Rembolds claim they were defrauded as a result of their reliance on representations in the stock offering circular.

Finally, the Eleventh Circuit in *Craft* carefully warned against reliance on its decision to resolve issues not addressed.

> Before departing from this subject we add this word of caution. We are not called upon here to decide, nor do we express any views concerning the jurisdiction *vel non* of the district court under the federal securities laws when securities fraud is properly alleged and there has been Bank Board approval of a savings and loan conversion.

Id.

III. CONCLUSION

The district court erred in its conclusion that it lacked subject matter jurisdiction over the fraud claims alleged by the Rembolds. The review provisions of the National Housing Act regarding challenges to orders of the FHLBB do not apply to a private cause of action against a savings institution for fraudulent representations in a stock offering circular.

The only issue before this court is whether the district court had subject matter jurisdiction over the Rembolds' complaint. We need not address appellee's argument that the Rembolds have "not really" asserted security violations but have "bootstrapped" their opposition to the conversion into securities law and common law fraud claims. We have noted that the district court is not deprived of jurisdiction because of the inclusion of those claims. Appellee's argument that the alleged misrepresentations do not actually go to the securities law and common law fraud claims, but rather constitute an attack on the conversion, should be addressed to the district court as an argument on the merits, not on jurisdiction. *See generally Santa Fe Industries, Inc. v. Green,* 430 U.S. 462, 477-78 (1977) (upholding dismissal of complaint alleging faulty corporate business judgment rather than genuine securities violations); *Panter v. Marshall Field & Co.,* 646 F.2d 271, 287-88, 299 (7th Cir. 1981) (dismissing "bootstrap" claim). We have not determined nor do we express any opinion on the merits of the allegations in the complaint under Fed. R. Civ. P. 9(b) or 12(b)6 or 56. Those issues must first be addressed by the district court.

The Clerk of this Court is directed to calendar any further appeals in this matter before this panel.

The judgment is REVERSED.

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

Civil No. 85-224-FR

WAYNE C. REMBOLD and KAREN D. REMBOLD,
CLINT HERGERT, HENRY GRIFFIN,
DARRELL STEELE, and LYLE SCHNEIDER,
Plaintiffs,

v.

PACIFIC FIRST FEDERAL SAVINGS BANK, a federally chartered stock savings bank in the State of Washington;
PRICE WATERHOUSE & CO., a partnership; and
KAPLAN, SMITH & ASSOCIATES, INC.,
a Washington, D.C. corporation;
Defendants.

JUDGMENT

Based on the record,

It is ORDERED AND ADJUDGED this action is dismissed.

DATED this 17th day of May, 1985.

Helen J. Frye
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

Civil No. 85-224-FR

WAYNE C. REMBOLD and KAREN D. REMBOLD, CLINT HERGERT, HENRY GRIFFIN, DARRELL STEELE, and LYLE SCHNEIDER,
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PACIFIC FIRST FEDERAL SAVINGS BANK, a federally chartered stock savings bank in the State of Washington; PRICE WATERHOUSE & CO., a partnership; and KAPLAN, SMITH & ASSOCIATES, INC., a Washington, D.C. corporation;
Defendants.

OPINION AND ORDER

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FRYE, Judge:

This action arises from the conversion of the Pacific First Federal Savings Bank (Pacific First) from the mutual to the stock form of ownership in mid-1983. Plaintiffs are investors who purchased securities in connection with the conversion. Defendant Pacific First is a federally chartered stock savings bank. Defendant Kaplan Smith & Associates, Inc. (Kaplan Smith) is a diversified consulting firm that provides a range of financial, economic, and management consulting services to thrift institutions, commercial banks, and other financial service companies. Defendant Price Waterhouse & Co. (Price Waterhouse) is a firm of independent accountants with offices throughout the United States.

BACKGROUND

In 1933, Congress enacted the Home Owners' Loan Act which authorized the creation of federally chartered mutual savings and loan associations and allowed previously chartered state associations to convert to federal associations. In 1934, Congress enacted the National Housing Act, which created the Federal Savings and Loan Insurance Corporation (FSLIC). The FSLIC operates under the direction of the Federal Home Bank Board (FHLBB) and insures savings accounts maintained in federal savings and loan institutions.

In 1973, Congress enacted section 402(j) of the National Housing Act, which gave the FHLBB authority to approve the conversion of federal mutual associations into federal stock associations. On March 7, 1974, the FHLBB published the first set of conversion regulations.

The FHLBB regulations in effect at the time of the Pacific First conversion included the following requirements:

(1) adoption of a formal plan of conversion;

(2) publication of the plan;

(3) filing an application for conversion with the FSLIC;

(4) preparation of an independent appraisal of the market value of the institution, and review and approval of the appraisal by the FSLIC;

(5) approval of the plan of conversion by the association's members;

(6) the sale of the converting association's securities to those members of the association who wish to purchase them, in a so-called "Subscription Offering," prior to any offer to the public; and

(7) the sale of the remaining securities in a direct community and/or public offering.

Pacific First converted from a "mutual" to a "stock" savings bank in the summer of 1983, pursuant to a plan of conversion adopted by its Board of Directors in February, 1983 and approved by its members in July, 1983. An application for conversion was submitted to the FHLBB in April, 1983 and was approved by the agency in June, 1983. Pacific First retained Kaplan Smith to perform the independent appraisal required by the FHLBB and used in the circular. Price Waterhouse audited the books and certified the financial statements used by Pacific First in the circular.

On June 15, 1983, Pacific First distributed the Subscription Offer Circular to its members offering the securities for sale. This Subscription Offer closed on July 16, 1983. Plaintiffs purchased stock in Pacific First on or about July 17, 1983 pursuant to this Subscription Offer.

Plaintiffs bring this action under common law and federal and state securities laws based upon this initial offering of stock. Plaintiffs allege in their complaint that the circular was misleading in several respects. Plaintiffs allege that the value of Pacific First's assets in real estate and loan portfolio was overstated and that this overstatement was accompanied by an inadequate reserve to cover losses, as well as an overstatement of earnings in the event of a successful stock offering. Plaintiffs allege that the circular (1) failed to disclose a management strategy that anticipated virtually assured near-term losses; (2) failed to disclose the magnitude or timing of a second offering of stock; (3) failed to disclose that the size and nature of the second offering had been determined prior to plaintiffs' purchases; and (4) failed to disclose the effect the second offering would have on the plaintiffs. Plaintiffs allege that while the circular was prepared by Pacific First, defendants Kaplan Smith and Price Waterhouse played critical roles.

In the matter before the court all three defendants move the court pursuant to Fed. R. Civ. P. 12 for an order dismissing the complaint for one or more of the following reasons:

1. This court lacks subject matter jurisdiction over the matters alleged in the complaint;

2. The complaint fails to plead fraud with the specificity required by Fed. R. Civ. P. 9(b);

3. Plaintiffs do not have an implied right of action under either section 17(a) of the Securities Act of 1933 or section 10(b) of the Securities Exchange Act of 1934;

4. Plaintiffs have not, as a matter of law, suffered damages as a result of the "subsequent offering" alleged in paragraph 10 of the complaint;

5. Plaintiffs have not pleaded the elements of a violation of section 12(2) of the Securities Act of 1933;

6. Plaintiff Wayne Rembold fails to state a claim for relief since he was not in privity with Pacific First nor is he alleged to have ever purchased Pacific First stock;

7. Plaintiff Karen Rembold fails to state a claim for relief since the complaint alleges that she suffered no damages;

8. Count Seven of the complaint fails to state a claim for relief under the law of Oregon;

9. Count Ten fails to state a claim for relief since Pacific First did not owe a fiduciary duty to plaintiffs; and

10. This court lacks pendent jurisdiction over plaintiffs' state law claims.

ANALYSIS

Because of the court's disposition of this matter, it need only address the issue of subject matter jurisdiction.[1]

Defendants contend that plaintiffs' action is no more than "a challenge, in this court, to the FHLBB's review and approval of the price subscribers paid for shares of Pacific First stock, as well as the FHLBB's authorization to increase the number of

[1] Although it is not necessary to reach this issue, the court has serious doubts that defendants Kaplan Smith and Price Waterhouse are "sellers" under section 12(2) of the 1933 Act.

shares offered without allowing subscribers the opportunity to increase, decrease, or rescind their subscriptions." As a result, defendants contend that *exclusive* jurisdiction to review the actions of the FHLBB is vested in the United States Court of Appeals by section 402(j)(2) of the National Housing Act which provides in relevant part that:

> [A]ggrieved person[s] may obtain review of a final action of the [FHLBB] or the [FSLIC] *which approves, with or without conditions,* or disapproves *a plan of conversion . . . only* by complying with the provisions of subsection (k) of section 408 of this title [12 U.S.C. § 1730(k)] within the time limit and in the manner therein prescribed, which provisions shall apply in all respects as if such final action were an order the review of which is therein provided for. (Emphasis added.)

Section 408(k) in turn provides, in part:

> Any party aggrieved by an order of the [FSLIC] under this section may obtain a review of such order by filing in the court of appeals of the United States for the circuit in which the principal office of such party is located, or in the United States Court of Appeals for the District of Columbia Circuit, within thirty days after the date of service of such order, a written petition praying that the order of the [FSLIC] be modified, terminated or set aside. . . . Upon the filing of such petition, such court shall have jurisdiction, which upon the filing of the record shall be exclusive, to affirm, modify, terminate, or set aside, in whole or in part, the order of the [FSLIC].

Plaintiffs respond to the defendants' position by asserting that they do not challenge the fact or the right of Pacific First to convert to stock ownership, the price at which Pacific First chose to offer its stock, the right of the FHLBB to allow the conversion or the procedure by which the FHLBB gave its approval. Plaintiffs contend that they "simply claim that material misrepresentations and omissions were made in the ultimate sale of the securities." Plaintiffs contend that the

FHLBB regulations do not usurp the role of the securities law in protecting the public from investor fraud and that while the FHLBB regulates the procedure and form of the conversion, the content and accuracy of the information presented remains subject to securities law.

Defendants contend that plaintiffs are attempting to evade the exclusive review provisions of the National Housing Act by casting their complaint in the language of a securities claim. Defendants assert that the Federal Home Board regulations specifically address the issue of misleading materials in the conversion process and point to 12 C.F.R. § 563b.3(h) which states:

> (h) *Manipulative and deceptive devices.* In the offer, sale or purchase of securities issued incident to its conversion, no insured institution, or any director, officer, attorney agent or employee thereof, shall: (1) Employ any device, scheme, or artifice to defraud, or (2) obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (3) engage in any act, transaction, practice, or course of business which operates or would operate as a fraud or deceit upon a purchaser or seller.

In support of their position, defendants rely upon the case of *Harr v. Prudential Federal Savings and Loan Association,* 557 F.2d 751 (10th Cir. 1977), *cert. denied* 434 U.S. 1033 (1978). In *Harr,* plaintiff brought an action alleging that a plan to convert a mutual association to a stock association was part of a conspiracy by the directors to benefit themselves and the officers and that the proxy materials were deceptive and misleading. The district court dismissed the action for lack of subject matter jurisdiction, on the grounds that the action amounted to a challenge to the FHLBB's approval of the

conversion and jurisdiction to review was vested in the court of appeals. The court of appeals affirmed, explaining:

> . . . [W]e must hold that the cause of action, no matter how otherwise described, must in the first instance be a challenge to the approval by the Bank Board of the plan of conversion, and the consideration of the proxy materials. It is "The Plan" itself which is the real basis for the arguments advanced here by the plaintiffs. The attempted reliance on Rule 10b-5 is at best a secondary or derivative position.
>
> * * *
>
> It does not make much difference whether this is called an exhaustion of administrative remedies, or whether it is viewed as what in reality is a challenge to the Bank Board's decision although cast in terms of Rule 10b-5. The consequences are the same and we must affirm the trial court. The subject matter, the nature of plaintiffs' claim, and the arguments before this court demonstrate that the relief sought can only be afforded by a challenge to the Bank Board's action as the basic decision and authorization for the acts and consequences complained of. 557 F.2d at 754.

Plaintiff contends that this case is different from *Harr.* Plaintiff points to the fact that plaintiffs in *Harr* were depositors in the mutual association and had not purchased any stock and that plaintiffs in this case, unlike in *Harr,* do not seek a remedy for the decision by the FHLBB to allow a conversion.

Plaintiffs in *Harr* were depositors who complained of the amount of "free" stock they had received in the stock distribution pursuant to the conversion. In *Harr,* as in the case before the court, plaintiffs received their right to acquire stock from their status as depositor/members. The court does not find this distinction convincing.

CONCLUSION

The critical issue in this case is whether plaintiffs' challenge is in reality "wholly a consequence of the Board's approval of the [conversion] plan." 557 F.2d at 754. The court finds that plaintiffs' challenge to the Subscription Offering Circular and to the issuing of subsequent offerings amounts to no more than a challenge to the conversion process as approved by the FHLBB. Congress has chosen to vest review of such action exclusively in the Court of Appeals and this court will not read this complaint to circumvent that exclusive review.

IT IS ORDERED that the motions to dismiss of defendants Pacific First, Kaplan Smith, and Price Waterhouse are GRANTED.

DATED THIS 17th day of May, 1985.

Helen J. Frye
United States District Judge

(2)

No. 86-940

In The

Supreme Court of the United States

October Term, 1986

Pacific First Federal Savings Bank,
Price Waterhouse and
Kaplan, Smith & Associates, Inc.,

Petitioners,

v.

Wayne C. Rembold, Karen D. Rembold,
Darrell Steele and Lyle Schneider,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether certiorari should issue to review a decision of the Court of Appeals that the district court had erred in its dismissal for lack of subject matter jurisdiction over plaintiffs' claims under federal and state securities laws because the alleged misrepresentations and omissions that formed the basis of the claims were contained in a stock offering circular issued by a savings and loan institution after its conversion from mutual to stock ownership form of organization.

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Pacific First Federal Savings Bank,
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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

Respondents, Wayne C. Rembold, Karen D. Rembold, Darrell Steele and Lyle Schneider respectfully pray that the petition for certiorari to review the opinion and judgment entered in this proceeding by the United States Court of Appeals for the Ninth Circuit on September 3, 1986, be denied.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 798 F.2d 1307 and is included in the Appendix to the Petition for Certiorari (Petitioners' Appendix at pp. 1a-12a). The opinion of the United States District Court for the District of Oregon is unreported. This opinion and order is included at pp. 13a-22a of Petitioners' Appendix.

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JURISDICTION

The jurisdictional prerequisites are adequately set forth in the Petition.

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STATEMENT OF THE CASE

Background

This lawsuit arises out of the sale of stock in Petitioner, Pacific First Federal Savings Bank ("Pacific First"), and the purchase of shares of this stock by Respondents pursuant to a subscription offering circular on or about July 16, 1983. The Respondents filed suit in the United States District Court for the District of Oregon in February, 1985 alleging violations of §§ 12(2) and 17(a) of the Securities Act of 1933, 15 U.S.C. § 77l and 15 U.S.C. § 77q, and § 10b of the Securities Exchange Act of 1934, 15 U.S.C. § 78j and Rule 10b-5 promulgated thereunder, 17 C.F.R. 240.10 (b-5), as well as pendent state claims under the Oregon and Washington securities laws and

common law claims for fraud and negligence. These claims, as set forth in the complaint, are predicated upon certain misrepresentations and material omissions in the subscription offering materials upon which Respondents relied in the purchase of their stock. The entire complaint is reproduced in the Respondents' Appendix (Appendix 1a through 15a) to dispel any confusion as to the nature of Respondents' claims caused by Petitioners' mischaracterization of the complaint.

Petitioners moved the district court to dismiss the complaint on ten separate grounds, including the lack of subject matter jurisdiction and failure to state a claim on which relief could be granted. The district court, without reaching any of the other grounds for dismissal, dismissed the suit for lack of subject matter jurisdiction after finding that the respondents' claims constituted a challenge to the conversion process approved by the Federal Home Loan Bank Board (FHLBB) by which Pacific First had converted from a mutual savings and loan to a stock form of organization. The district court held that it lacked jurisdiction because of the exclusive jurisdiction vested in the Court of Appeals to review conversion-related orders of the FHLBB contained in § 402(j)(2) and 408(k) of the National Housing Act, 12 U.S.C. 1464(i)(4) (1982) and 12 U.S.C. 1730a(k) (1982). The district court relied for its holding solely on the Tenth Circuit decision in *Harr v. Prudential Federal Savings and Loan Association*, 557 F.2d 751 (10th Cir. 1977), *cert. denied*, 434 U.S. 1033 (1978). (Petitioners' Appendix at pp. 20a-22a.)

Respondents appealed this dismissal to the United States Court of Appeals for the Ninth Circuit. The Ninth

Circuit reversed the district court and held that the district court had erred in concluding that it lacked subject matter jurisdiction over the common law and securities claims asserted by Respondents. The Court of Appeals found that the National Housing Act contained neither an explicit nor implied repeal of the antifraud remedies of the securities laws. The court further found no incompatability between the remedies provided by these statutes. The Court of Appeals rejected petitioners' interpretation of the law that the only remedy for defrauded investors was an appeal to the Court of Appeals within 30 days of a FHLBB final order approving conversion, and characterized this remedy as "futile" and "patently unreasonable." The court found that Respondents, unlike the plaintiffs in *Harr* and *Craft v. Florida Federal Savings & Loan Association,* 786 F.2d 1546 (11th Cir. 1986), had alleged cognizable securities fraud claims over which the district court had jurisdiction.

REASONS FOR DENYING THE WRIT

The Petition for Certiorari should not be granted to review the decision of the Court of Appeals because (1) the decision does not present a conflict among the circuits and (2) the decision does not present an important question of federal law and will have no impact on the operations of the Federal Home Loan Bank Board or on the future conversion of mutual savings and loans associations to stock ownership institutions.

I. The Court Of Appeals' Decision Does Not Present A Conflict Within The Circuits.

Petitioners assert that the Court of Appeals' decision below is in direct conflict with decisions by the 10th Circuit in *Harr v. Prudential Federal Savings and Loan Association,* 557 F.2d 751 (10th Cir. 1977), and the Eleventh Circuit in *Craft v. Florida Federal Savings & Loan Association,* 786 F.2d 1546 (11th Cir. 1986). There is no such conflict as the Ninth Circuit correctly noted in its opinion. (Petitioners' Appendix at pp. 8a-11a).

In *Harr,* the plaintiffs, who had received free stock in the converted institution as depositors, challenged certain aspects of the plan of conversion in the district court, and simultaneously appealed the FHLBB final order to the Court of Apeals pursuant to 12 U.S.C. § 1730a(k), attaching the fairness of the plan. Both the decision on the appeal from the district court's dismissal of the former action, and the decision on the direct appeal of the FHLBB's conversion order were decided by the same judge on the same day. *Harr v. Federal Home Loan Bank,* 557 F.2d 747 (10th Cir. 1977), *cert. denied,* 434 U.S. 894 (1978) and *Harr v. Prudential Federal Savings and Loan Association,* 557 F.2d 751 (10th Cir. 1977). The gravamen of both suits was an attack on the fairness of the conversion plan because of the date chosen by the savings and loan for determining the amount of free stock to be distributed to depositors. The plaintiffs' allegations of securities fraud in the district court case, which the Tenth Circuit described as "at best a secondary or derivative position", 557 F.2d at 753, related solely to alleged defects in proxy solicitation materials requesting depositor approval of the conversion.

These proxy materials, which were also challenged in the second suit as being in violation of FHLBB regulations, had been examined and approved by the FHLBB pursuant to 15 U.S.C. § 78i. Thus, the Court of Appeals in the *Harr* decision never reached the issue on which the Ninth Circuit based its decision, "whether Congress intended to deprive a district court of the jurisdiction to hear common law and federal and state securities law violations in a stock offering issued after conversion of a mutual bank to a stock form of organization." (Petitioners' Appendix at 4a).

In *Craft v. Florida Federal Savings & Loan Association,* 786 F.2d 1546 (11th Cir. 1986)[1] the Eleventh Circuit was similarly not faced with the issue before the Ninth Circuit in the instant case. In *Craft,* the plaintiffs' securities claims, which the court described as "bare bones allegations", were directed at the large increase in the amount of stock to be offered for sale in the public offering that followed the subscription offering in which plaintiffs had puchased their stock. *Id.* at 1554. The plaintiffs in *Craft* challenged the FHLBB's failure to require rescission of the purchases under the subscription offering and a recirculation of this offering after the decision was made to significantly increase the amount of stock sold. In discounting these claims, the Court of Appeals noted that the complaint failed to "allege any false or misleading statements." *Id.* The court found that a challenge to this alleged deficiency was, in reality, a challenge to the plan itself in that the FHLBB had not required such a recirculation. Finally the *Craft* court specifically warned that

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[1]The *Craft* appeal was decided after submission of the briefs in the instant matter, but prior to argument.

it was not deciding the issue that the Ninth Circuit addressed in the instant case:

> Before departing from this subject we add this word of caution. We are not called upon here to decide, nor do we express any views concerning the jurisdiction *vel non* of the district court under the federal securities laws when securities fraud is properly alleged and there has been Bank Board approval of a savings and loan conversion.

Id. at 1554.

In the instant case, the complaint (Appendix at pp. 1a-15a) relies solely on alleged misrepresentations and material omissions contained in the subscription offering circular upon which respondents relied in making their decision to purchase the stock. As this court has recognized, the very essence of the antifraud provisions of the securities laws is to implement a policy of full disclosure. *Santa Fe Industries v. Green*, 430 U.S. 462, 478 (1977). It is this lack of full and accurate disclosure, and not the fairness of the conversion plan, or the price of the stock, that is the crux of this case.

The alleged misrepresentations and omissions in the instant case are not "part and parcel of the plan of conversion." *Harr v. Prudential Federal Savings and Loan Association*, 557 F.2d at 754. The accuracy of the contents of the subscription offering circular, about which respondents complain, was specifically not passed upon by FHLBB. A disclaimer to this effect is required to be printed in the offering circular, 12 C.F.R. § 563b.7(d), and did, in fact, appear in the Pacific First circular. These securities allegations are not extraneous claims added to circumvent the exclusive review of conversion plans by the

Court of Appeals, but rather form the very heart of the Complaint. Thus, as the Ninth Circuit correctly concluded, no conflict exists between this decision and those of the Tenth Circuit in *Harr* and the Eleventh Circuit in *Craft*.

II. The Decision Presents No Important Questions Of Federal Law And Will Have No Effect On The Functions Of The FHLBB Or On The Process Of Conversion Of Savings And Loan Associations To Stock Ownership Organizations.

A. The Decision Will Not Adversely Affect the Savings and Loan Industry.

Petitioners assert that the Court of Appeals' decision will undermine FHLBB's control over conversions of savings and loans. They forecast dire consequences that will lead to the decline of the entire savings and loan industry if the decision is allowed to stand. Such hysterical predictions are completely unjustified. The Court of Appeals' decision merely follows this court's holding in *Tcherepnin v. Knight*, 389 U.S. 332 (1967) that instruments that otherwise fall within the definition of securities, that are issued by savings and loans are subject to claims under § 10b of the Securities Exchange Act of 1934 and Rule 10-b(5) promulgated pursuant to it. The effect of the Ninth Circuit's decision merely preserves for Petitioners, and other purchasers of stock in the subscription offering of converting savings and loans, a reasonable opportunity for redress if they relied upon misrepresentations and material omissions in the offering materials. There is no inconsistency between the recognition of this remedy and either the letter, or spirit, of the statutes cited by petitioners or the regulations of the FHLBB. Both, as the

Court of Appeals noted, "protect shareholders who purchase stock in a savings institution from violations of the law." (Petitioners' Appendix at p. 6a).

To support their assertion of a threat to the industry, petitioners incorrectly characterize the relief which Respondents seek as requiring the modification or unwinding of the Pacific First conversion (Petition at p. 12). Such an assertion is without support. The complaint seeks only the measure of damages to which defrauded investors are entitled upon proof of a violation of the securities laws. (Appendix at pp. 14a-15a). Such relief amounts to money damages and not the setting aside of the conversion plan. Respondents have not, and do not, challenge the fairness of the conversion plan or the price of the stock as did the plaintiffs in *Craft* or *Harr*. The claims alleged in this case are those of a "garden variety" securities fraud suit based upon an offering circular, the accuracy or adequacy of which were never endorsed by the FHLBB.

B. The Decision of the Court of Appeals is Apparently One of First Impression.

Petitioners' assertion of the importance of the decision below is belied by the fact that despite the 470 conversions over the past ten years (Petition at p. 9) the Court of Appeals' decision below is apparently the first reported decision on this issue. Even conceding, for the sake of argument, that *Harr* and *Craft* deal tangentially with the same issue, there is still a relative paucity of cases dealing with the relation between the securities laws and the National Housing Act and regulations relating to stock issued by converting savings and loan institutions. This

court should not review these matters at this early stage in the development of the case law.

C. The Decision Correctly Applied the Test to Determine That There Was Jurisdiction and Did Not Rule on the Merits of Respondents' Claims.

The Court of Appeals correctly declined to analyze the merits of respondents' claims in determining whether there was subject matter jurisdiction. As this court has long recognized:

> Jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction . . .

Bell v. Hood, 327 U.S. 678, 682 (1946).

The court went on to describe the limited exceptions to the rule articulated above as follows:

> that a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.

Id. at 682-3.

The claims asserted in the instant case, like those asserted in *Bell,* are not immaterial, insubstantial or frivolous and clearly present a claim for recovery under the laws of the United States. Contrary to respondents' assertion, the district court did not find otherwise. The federal securities claims are not interposed for purposes of

obtaining federal jurisdiction but go to the essence of respondents' case. The Court of Appeals correctly applied this rule, and therefore found that an analysis of the merits of these claims on a motion to dismiss for lack of subject matter jurisdiction was inappropriate.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari is without merit and should be denied.

DATED: January 8, 1987

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

WAYNE C. REMBOLD and KAREN D. REMBOLD, CLINT HERGERT, HENRY GRIFFIN, DARRELL STEELE, and LYLE SCHNEIDER, Plaintiffs, v. PACIFIC FIRST FEDERAL SAVINGS BANK, a federally chartered stock savings bank in the State of Washington, PRICE WATERHOUSE & CO., a partnership, and KAPLAN, SMITH & ASSOCIATES, INC., a Washington, D.C. corporation, Defendants.	Civil No. 85-224 COMPLAINT FOR SECURITIES LAW VIOLATION JURY TRIAL DEMANDED (Filed February 6, 1985)

Plaintiffs allege:

JURISDICTION AND VENUE

1. Counts One and Two arise under Sections 12 and 17 of the Securities Act of 1933, 15 U.S.C. § 77l and 15 U.S.C. § 77q. Jurisdiction for these Counts is conferred by 15 U.S.C. § 77v. Count Three arises under Section 10 of the Securities Exchange Act of 1934 and Rule 10b-5

promulgated thereunder, 15 U.S.C. § 78j and 17 C.F.R. 240.10(b-5). Jurisdiction for this count is conferred by 15 U.S.C. § 78aa. Jurisdiction for Counts Four, Five, Six, Seven, Eight, Nine, and Ten arises under the same statutes and under the principles of pendent jurisdiction. The acts alleged in this complaint took place in part in the State of Oregon, including the sales of securities.

DESCRIPTION OF PARTIES

2. On or about July 16, 1983, plaintiffs purchased stock in defendant Pacific First Federal as set out below:

(a) Wayne and Karen D. Rembold (Rembold) are husband and wife and residents of Portland, Oregon. Karen D. Rembold, in Oregon, subscribed for and purchased 130,000 shares of Pacific First Federal stock at $15 per share for $1,950,000.00. On or about November 9, 1983, Karen Rembold transferred all the stock to Wayne Rembold without realizing any gain or loss. At approximately the same time, Wayne Rembold transferred an additional 11,812 shares without realizing any gain or loss, leaving a total of 118,188 shares at risk with a total investment of $1,772,820.00. At all material times, plaintiffs Rembold were acting on behalf of and on account of and in a fiduciary relationship to one another.

(b) Clint Hergert is a resident of Auburn, Washington who subscribed for and purchased in that state 66,863 shares of Pacific First Federal stock at $15 per share for a total investment of $1,002,945.00.

(c) Henry Griffin is a resident of Tacoma, Washington who subscribed for and purchased in that state 66,863 shares of Pacific First Federal stock at $15 per share for a total investment of $1,002,945.00.

(d) Darrell Steele is a resident of Bellevue, Washington who subscribed for and purchased in that state 5000 shares of Pacific First Federal stock at $15 per share for a total investment of $75,000.00.

(e) Lyle Schneider is a resident of San Francisco, California who subscribed for and purchased in the state of Washington 60,000 shares of Pacific First Federal stock at $15 per share for a total investment of $900,000.00.

3. Pacific First Federal Savings Bank ("Pacific First Federal" or "the Bank") is a federally chartered stock savings bank with its home office in Tacoma, Washington, transacting business in Oregon and other states.

4. Defendant Price Waterhouse & Co. (Price Waterhouse) is a partnership with numerous partners throughout the United States engaged in the business of providing accountant services. Price Waterhouse transacts business in Oregon and other states.

5. Defendant Kaplan, Smith & Associates, Inc. ("Kaplan, Smith") is a Washington, D.C. corporation, engaged in the business of financial consulting. Kaplan, Smith transacts business in Oregon and other states.

FACTS RELEVANT TO ALL CLAIMS FOR RELIEF

6. On or about June 15, 1983, defendant Pacific First Federal, as part of a plan by which it converted from a federal mutual to a federal stock savings bank, issued and offered 5,800,000 shares of common stock for sale to depositors, employees, officers and others at a price eventually set at $15 per share ("the offering.")

7. Information concerning the offering was distributed to prospective purchasers of the stock, including plaintiffs, by defendant Pacific First Federal, by means of a Subscription Offering Circular dated June 15, 1983. The Subscription Offering Circular was prepared by the Bank with the assistance of defendant Price Waterhouse, which prepared the audited financial statements and with the assistance of defendant Kaplan Smith which prepared the stock valuation.

8. As a result of and in response to the offering, and in reliance on the Subscription Offering Circular, and without knowledge of the untruths or omissions as set forth in paragraphs 9 and 10, plaintiffs purchased Pacific First Federal stock as set out with more particularity in paragraph 2.

9. The Subscription Offering Circular contained the following misrepresentations:

(a) The statement of projected future earnings of Pacific First Federal was significantly and materially in excess of actual reasonably anticipated earnings;

(b) The value of real estate owned by Pacific First Federal was significantly and materially overstated; and

(c) The value of loans outstanding to Pacific First Federal was significantly and materially overstated.

10. The Subscription Offering Circular omitted and failed to state the following material facts which were necessary to be made, in order to make the statements which were made, in light of the circumstances under which they were made, not misleading:

(a) That an investor in the offered securities took a risk that the value of the security could go down, or that the Bank could go out of business and the entire investment lost;

(b) That the strategy for the management of Pacific First Federal was such that the short-term value of the stock was likely to decrease precipitously in the uncertain hope of ultimate long-term recovery;

(c) That a subsequent offering of Pacific First Federal stock was anticipated and had, in fact, already begun and that this subsequent offering would dilute the value of the stock purchased pursuant to the first offering and would be likely to drive down the value of the stock;

(d) That a subsequent offering as set forth in (c) above would create a market in which purchasers in the original offering would not be able to sell their stock until approximately three weeks had passed;

(e) That is the event of a subsequent offering as set forth in (c) above, purchasers such as plaintiffs would not be able to modify or cancel their subscriptions;

(f) That the value assigned to the real estate owned by Pacific First Federal in the Subscription Offering Circular was not fair market value and that there was a significant possibility, based upon the past experience of Pacific First Federal, that the value assigned was greatly in excess of fair market value;

(g) That the value assigned to Pacific First Federal's loan portfolio was not fair market value and that there was a significant possibility, based upon the experi-

ence of the Bank, that the value assigned was greatly in excess of fair market value;

(h) That the reserves set aside to cover future losses were insufficient to cover anticipated losses; and

(i) That the fair market value of Pacific First Federal's loan portfolio and other real estate owned by Pacific First Federal was unknown.

COUNT ONE

1933 Securities Act, Violation of § 12(2), 15 U.S.C. § 77l(2) Against All Defendants

11. Defendant Pacific First Federal offered and sold the Pacific First Federal stock purchased by plaintiffs. The Bank either knew or failed to exercise reasonable care to determine whether the information contained in the Subscription Offering Circular, as set out in paragraphs 9 and 10 was inaccurate.

12. Defendant Price, Waterhouse participated in and aided and abetted the offer and sale of the Pacific First Federal stock purchased by plaintiffs in that Price, Waterhouse prepared the financial statements contained in the Subscription Offering Circular and the information set forth in subparagraphs (b) and (c) of paragraph 9 and in subparagraphs (f), (g), (h) and (i) of paragraph 10 of this Complaint. Price Waterhouse knew or should have known that the statements it prepared would be used in the Subscription Offering Circular and that it would be relied upon by plaintiffs, and Price Waterhouse failed to use reasonable care to see that the information was accurate and presented in a manner that was not misleading to investors, including plaintiffs.

13. Defendant Kaplan, Smith participated in and aided and abetted the sale of Pacific First Federal stock to plaintiffs in that Kaplan, Smith prepared a valuation of the stock to be issued by the Bank and it consented to the use of a summary of its valuation in the Subscription Offering Circular which summary did appear therein. Kaplan, Smith knew or should have known that the summary of its valuation would be relied upon by plaintiffs in their purchase of the Bank's stock. The valuation prepared by Kaplan, Smith and the summary of valuation which appeared in the Subscription Offering Circular contained omissions of material facts necessary to be made in order to make the summary of the valuation, in light of the circumstances under which it was disclosed, not misleading, which omissions Kaplan, Smith knew or in the exercise of reasonable care should have known, including:

(a) The consolidated financial statements appearing in the Subscription Offering Circular did not properly or adequately reflect the true fair market value of real estate owned by the Bank and loans owed to the Bank which true market value was significantly lower than the values disclosed; and

(b) The valuation and its summary did not account for the true fair market value of real estate owned by the Bank and loans owing to it, but was based on a higher value.

14. The falsity of the statements set out in Paragraph 9 and the omissions set out in Paragraphs 10 and 13 were not discovered by plaintiffs and could not have been discovered by them to have been false or misleading until after February 6, 1984, when defendant Pacific First Fed-

eral issued a press release, which for the first time, disclosed substantial loan and real estate losses. The losses were disclosed by a restatement of the value of the Bank's loan portfolio and real estate properties which was more closely in accord with actual fair market value.

15. Plaintiffs Rembold, Hergert, and Griffin still own all or some of the shares of stock which they purchased in Pacific First Federal.

16. Plaintiffs Schneider, Rembold and Steele have sold all or some of their stock in Pacific First Federal for the amounts set out below and are entitled to damages, also as set out below, plus prejudgment interest from the date of purchase to the date of sale.

Plaintiff	No. of Shares Sold	Amount	Loss on Sale
Steele	5,000	$ 43,618.90	$ 31,381.10
Schneider	60,000	$435,625.00	$464,375.00
Rembold	45,200	$466,587.50	$212,812.50

17. Plaintiffs Hergert, Griffin and Rembold expect to sell their remaining stock in the future but are now willing to rescind their purchases and do thereby tender all their remaining stock in the Bank. They are therefore entitled to damages in the amount of their original purchases as set forth in Paragraph 2, together with prejudgment interest from the date of purchase, less the proceeds of sales and interest from the date of sale.

18. Defendants' acts constitute a violation of § 12(2) of the Securities Act of 1933, 15 U.S.C. § 77l(2).

COUNT TWO

1933 Securities Act, Violation of § 17a, 15 U.S.C. § 77q(a) Against All Defendants

19. Plaintiffs reallege Paragraphs 1 through 18.

20. Defendants, with the use and means of instruments of transportation and communication in interstate commerce and by the use of the mails in sending the Subscription Offering Circular and other promotional materials to investors and in contacting investors, employed a device, scheme and artifice to defraud and to obtain money and property by means of untrue statements of material fact and by means of omissions of material facts necessary to make the statements made not misleading and further engaged in transactions, practices and in a course of business that operated as a fraud and deceit on plaintiffs.

21. Defendants knew or recklessly failed to determine the true facts which they misrepresented to plaintiffs and knew or recklessly failed to determine the facts which they omitted to state to plaintiffs. Defendants intended that plaintiffs rely on their misrepresentations and plaintiffs did rely in making their purchases.

22. Defendants' acts constitute a violation of § 17a of the Securities Act of 1933, 15 U.S.C. § 77q.

COUNT THREE

Securities Exchange Act of 1934,
Violation of § 10b, 15 U.S.C. § 78j(b)
Against All Defendants

23. Plaintiffs reallege Paragraphs 1 through 18, above.

24. All defendants knew the true nature of the facts which were misrepresented to plaintiffs in the Subscription Offering Circular, or recklessly failed to ascertain whether the facts represented to plaintiffs were true. Defendants knew or recklessly failed to learn the facts that they omitted to state to plaintiffs and knowingly or recklessly failed to disclose those facts to plaintiffs, even though they knew or should have known that said facts were unknown to plaintiffs and that plaintiffs would rely upon the misrepresentations in purchasing the stock.

25. Defendants' acts constitute a violation of § 10b of the Securities Exchange Act of 1934 and Rule 10b-5, 15 U.S.C. § 78j(b) and 17 C.F.R. 240.10(b-5).

COUNT FOUR

Oregon Securities Law Violation of ORS 59.115
Against All Defendants—Plaintiff Rembold

26. Plaintiffs reallege Paragraphs 1 through 18.

27. The acts of defendants, as described above, constitute violations of ORS 59.115(1)(b) in that the defendants offered or sold or aided and abetted or participated in the offer and sale of securities to plaintiffs Rembold in Oregon by means of an untrue statement of a material fact or an omission to state a material fact necessary in

order to make the statements made, in light of the circumstances under which they were made, not misleading (plaintiff Rembold not knowing of the untruth or omission).

28. Plaintiff Rembold has been required to retain an attorney to recover the damages due him under the Oregon Securities law and he is entitled to recover from defendants a reasonable attorney fee as set by the court pursuant to ORS 59.115(2).

COUNT FIVE

Securities Act of Washington Violation of RCW 21.20.430 Against All Defendants—All Plaintiffs Except Rembold

29. Plaintiffs reallege Paragraphs 1 through 18.

30. The acts of defendants, as described above, constitute violations of RCW 21.20.430 in that said defendants sold or aided and abetted or participated in the sale of securities in Washington to plaintiffs Hergert, Griffin, Steele, and Schneider by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.

31. Plaintiffs have been required to retain an attorney to recover the damages due them under the Washington Securities law and plaintiffs are entitled to recover from defendants a reasonable attorney fee as set by the court pursuant to RCW 21.20.430.

COUNT SIX

Common Law Fraud Against All Defendants

32. Plaintiffs reallege Paragraphs 1 through 18, above.

33. The misrepresentations of defendants as set out in Paragraph 9 were known by defendants to be false at the time they were made and the omissions to state material facts as set out in Paragraphs 10 and 13 were knowingly omitted and were known by defendants to be misleading and the misrepresentations and omissions were intended by defendants to be relied upon by plaintiffs or similar persons in plaintiffs' position.

34. Plaintiffs did rely on the representations set forth above in making their purchases of Pacific First Federal stock.

COUNT SEVEN

Negligence Against Defendant Pacific First Federal

35. Plaintiffs reallege Paragraphs 1 through 18, above.

36. Defendant Pacific First Federal breached a duty of care to plaintiffs in that it negligently disclosed false statements of fact as set out in paragraph 9 and negligently failed to disclose material facts which should have been disclosed as set out in paragraph 10.

COUNT EIGHT

Negligence Against Defendant Price Waterhouse

37. Plaintiffs reallege Paragraphs 1 through 18, above.

38. Defendant Price Waterhouse breached a duty of care to plaintiffs in that it negligently failed:

(a) To determine if the values shown in the consolidated financial statements in the Subscription Offering Circular of real estate owned by and loans owing to the Bank were significantly and materially overstated;

(b) To note on the consolidated financial statement in the Subscription Offering Circular that the values of real estate owned by and loans owing to the Bank as sohwn on the consolidated financial statement could be materially and substantially in excess of true market value;

(c) To determine if the method used by Pacific First Federal to evaluate real estate it owned and loans owing to it were reasonably likely to result in a valuation in proximity to fair market value; and

(d) To make adequate and reasonable investigation to determine if significant and permanent declines in the value of loans owed to the Bank and real estate owned by the Bank had occurred over and above those disclosed on the consolidated financial statement.

COUNT NINE

Negligence Against Defendant Kaplan, Smith

39. Plaintiffs reallege Paragraphs 1 through 18, above.

40. Defendant Kaplan, Smith breached a duty of care to plaintiffs in preparing its valuation, in that:

(a) It failed to account for the difference between the value of the loans to the Bank and real estate owned by the Bank as disclosed in the consolidated financial statement and the actual fair market value of said loans and real estate; and

(b) It placed too much emphasis on short-term securities market factors at the expense of long-term market factors, long-term economic conditions in the Bank's business area and over-all economic strength of the Bank.

COUNT TEN

Breach of Fiduciary Duty Against Defendant Pacific First Federal

41. Plaintiffs reallege Paragraphs 1 through 18, above.

42. At the time of the stock purchases by plaintiffs, all plaintiffs were banking customers of the Bank and reposed special confidence and trust in the Bank to make a full and fair disclosure in all dealings between the Bank and plaintiffs.

43. Defendants' acts were wilful, wanton and reckless, and in aggravated disregard for the rights of plaintiffs.

WHEREFORE, plaintiffs pray for relief as follows:

1. For damages as set out in Paragraphs 16 and 17, including prejudgment interest;

2. For reasonable attorney fees and all costs of investigation and litigation reasonably incurred herein;

3. For punitive damages for plaintiff Rembold in the amount of $5,800,000; and

4. For such other relief as the court deems just and equitable.

Respectfully submitted,

/s/ Daniel H. Rosenhouse
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N. Robert Stoll, Trial Attorney

Plaintiffs respectfully request trial by jury.

/s/ Daniel H. Rosenhouse

No. 86-940

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PACIFIC FIRST FEDERAL SAVINGS BANK,
PRICE WATERHOUSE and
KAPLAN, SMITH & ASSOCIATES, INC.,
Petitioners,

v.

WAYNE C. REMBOLD, KAREN D. REMBOLD,
DARRELL STEELE and LYLE SCHNEIDER,
Respondents.

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Respondents purport to distinguish the decisions in *Harr v. Prudential Federal Savings and Loan Association,* 557 F.2d 751 (10th Cir. 1977) and *Craft v. Florida Federal Savings & Loan Association,* 786 F.2d 1546 (11th Cir. 1986) from the decision of the Ninth Circuit in this proceeding on the feeble basis that they, unlike the plaintiffs in *Harr* and *Craft, truly* rely on alleged misrepresentations in the subscription offering circular and that the petition for review mischaracterizes their complaint, which respondents include in the appendix to their brief.[1] Their contention has no merit.

[1] In their statement of the Question Presented, respondents suggest that the stock offering circular was issued "after" Pacific First's conversion from the mutual to stock form of ownership. However, as set forth in the complaint, the decision of the district court and the Ninth Circuit decision, the subscription offering circular was issued as a necessary part of, not after, the conversion. Respondents allege they bought their stock in the conversion; they are not post-conversion purchasers.

The complaint was properly characterized by the district court's finding that it "amounts to no more than a challenge to the conversion process as approved by the FHLBB" (Petition at 7-8). In reaching this conclusion, the district court had before it certified and undisputed copies of the subscription offering circular which, according to the complaint, failed to disclose information relating, for example, to the terms of the so-called "subsequent offering," *i.e.*, the public offering phase of the conversion. The district court thus was able to determine that the complaint, though phrased in terms of misrepresentation under the federal securities laws, actually was a challenge to the conversion process itself. Indeed, the respondents' allegations concerning the "subsequent offering" are virtually identical to those in *Craft*. While the Eleventh Circuit in *Craft* saw through those allegations and dismissed for lack of subject matter jurisdiction, the Ninth Circuit erroneously declined to address whether, in this case, a violation of the federal securities law was alleged in form only. Instead, the Ninth Circuit ruled it was sufficient that respondents "purport" to allege federal securities claims, regardless of the real nature of the pleading, as found by the district court. Federal jurisdiction should not be so freely extended where, as here, Congress has seen fit expressly to restrict jurisdiction.[2]

Respondents' second contention, that the Ninth Circuit's decision does not present a question of national importance and will have no effect on the savings and loan industry, cannot be taken seriously. Although respondents rely upon *Tcherepnin v. Knight*, 389 U.S. 332 (1967), in asserting that securities issued by savings and loans already are subject to the securities laws, they fail to point out that *Tcherepnin* involved withdrawable capital shares in a state-chartered association, a situation wholly

[2] The so-called "warning" in *Craft*, emphasized by respondents, that the Eleventh Circuit was not deciding whether jurisdiction exists where securities fraud "is properly alleged" (Opposition at 7), is inapposite. Because the Ninth Circuit, in this case, refused to consider whether respondents' pleading truly stated a claim for securities fraud, it also did not address whether jurisdiction exists where proper claims are stated. As discussed in the Petition at 15-16, the Ninth Circuit's failure to address the nature of the purported securities claims conflicts with the procedure followed by the Tenth and Eleventh Circuits in *Harr* and *Craft*.

inapposite to the conversion process involved in this case. *Tcherepnin* did not involve a federally-authorized, supervised and approved mutual-to-stock conversion, nor did it involve a statute by which Congress expressly deprived the district court of jurisdiction. It thus does not involve any of the concerns raised in this case or the problems of a federal industry subjected to extensive regulation and entrusted to the supervision of the FHLBB. Moreover, to the extent the Ninth Circuit decision "merely preserves . . . a reasonable opportunity for redress" (Opposition at 8), it contravenes Congress' express restriction and Congress' own determination of what is "reasonable" in the conversion context, and it constitutes an unwarranted extension of judicially-implied remedies.[3]

Respondents also characterize the petition for review as "forecast[ing] dire consequences" to the savings and loan industry and raising "hysterical predictions."[4] The financial condition of the savings and loan industry is a matter of public record, extensively reported in the media, as are the causes of the industry's problems and Congress' continuing concern.[5] Conversions, by which the "ownership" interests of depositors in the mutual form are converted to the equity interests of the new shareholders, are a "major means of building the net worth" needed by the industry. 49 Fed. Reg. 19000 (May 4,

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[3] Respondents also claim their requested relief does not seek a "modification or unwinding" of the conversion since they do not challenge the "price of the stock," but only seek "damages." This semantic difference is unconvincing. Respondents claim a right to rescind, which the FHLBB regulations denied to them, and/or a refund of the amount they allegedly overpaid. Indeed, if they are not challenging the price they paid, they would have no damages.

[4] Respondents suggestion that the Ninth Circuit's decision will have little, if any, impact on conversions is disingenuous. Indeed, on the heels of the Ninth Circuit's decision, and no doubt fueled thereby, counsel for respondents have filed a new lawsuit against petitioners on behalf of a new set of plaintiffs who allegedly acquired conversion stock. *See Shaw, et al.* v. *Pacific First Federal Savings Bank, et al.*, No. 87-59 PA (D. Oregon).

[5] *See, e.g., Administration To Push FSLIC Recapitalization; Officials Warn Of Liquidity Problems In Thrift System,* American Banker, Jan. 20, 1987, at 1; *Legislative Outlook Murky; Congress To Focus On Health Of FSLIC, Safety & Soundness And Consumer Protection,* BNA Banking Report, Jan. 5, 1987, at 24; *Sinking In A Sea Of Bad Loans; As Thrift Institutions Fail, Their Insurance Fund Is Running Low,* Time, Nov. 3, 1986, at 58.

1984). It cannot be gainsaid that the orderly functioning of the conversion process is a question of vital national significance at this time.

Respondents' opposition, in the final analysis, rests on their self-serving assertion that they should be allowed to undo a conversion in a manner prohibited by Congress because the issue presented for review is at an "early stage in the development of the case law." Yet, despite the more than 470 conversions which have occurred over the past ten years, respondents cite no case in which purchasers such as themselves have been allowed to use the federal securities laws in the manner they propose. The respondents' securities law claim was properly dismissed for lack of subject matter jurisdiction and the Ninth Circuit's decision to the contrary should be reviewed.

CONCLUSION

For the reasons set forth above and in the Petition, a writ of *certiorari* should be granted.

Respectfully submitted,

/s/ JAMES H. SCHROPP

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No. 86-940

In the Supreme Court of the United States

OCTOBER TERM, 1986

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v.

WAYNE C. REMBOLD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the Federal Home Loan Bank Board's approval of a saving institution's application to convert from a mutual to a stock form of ownership divested the district court of jurisdiction under the federal securities laws to consider fraud claims asserted by purchasers of stock offered pursuant to the conversion.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

This case arises out of the sale of stock in petitioner Pacific First Federal Savings Bank pursuant to Pacific First's conversion from a mutual to a stock form of ownership. Under the provisions of the National Housing Act and the Home Owners' Loan Act and regulations promulgated thereunder (12 U.S.C. 1725(j); 12 U.S.C. 1464(i); 12 C.F.R. Pt. 563b), Pacific First was required to obtain approval of its

conversion plan by the Federal Home Loan Bank Board (FHLBB). The approval was obtained in June, 1983, and shortly thereafter Pacific First offered its depositors preferential rights to purchase stock pursuant to a subscription offering circular (Pet. App. 2a).

Respondents, who allege that they purchased 328,726 shares of stock in reliance on the circular, filed suit in February, 1985, in the United States District Court for the District of Oregon, charging violations of the antifraud provisions of the federal securities laws (Pet. App. 2a).[1] The complaint alleged that the offering circular contained numerous material misrepresentations, including misrepresentations concerning the value of Pacific First's loan and real estate portfolios, the adequacy of its reserves against future losses and its anticipated future earnings (Br. in Opp. App. 4a-6a).

The district court dismissed the suit for lack of subject matter jurisdiction. The court held that it had no jurisdiction to hear respondents' securities law claims because, under 12 U.S.C. 1725(j)(2) and 1730a(k), judicial review of an FHLBB order ap-

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[1] Respondents alleged that petitioners violated Sections 12(2) and 17(a) of the Securities Act of 1933, 15 U.S.C. 77*l*(2) and 77q(a), and Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. 240.10b-5. The complaint also alleged violations of Oregon and Washington securities laws and several common law torts. In addition to Pacific First, the complaint named as defendants petitioners Kaplan, Smith & Associates, Inc., a financial consulting firm that appraised the stock, and Price Waterhouse, an independent accounting firm that rendered an opinion on the financial statements in the circular.

proving a conversion plan may be obtained only in a United States court of appeals (Pet. App. 22a).[2]

The Ninth Circuit reversed. The court of appeals first noted that the antifraud provisions of the federal securities laws apply generally to sales of savings institution securities. Pet. App. 5a (citing *Tcherepnin* v. *Knight*, 389 U.S. 332, 340-342 (1967)). It then concluded that nothing in the legislation granting authority to the FHLBB to approve conversions either expressly or impliedly exempts from the federal securities laws a sale of securities pursuant to a conversion. In this connection, the court observed that the exclusive review provision applies only "to the right to review by a party aggrieved by an 'order' of the FHLBB approving or disapproving a conversion plan" (Pet. App. 7a). "The [FHLBB review] statute makes no reference to the right to maintain a private cause of action against the savings institution by a person who has suffered damages as the result of misrepresentations in a *stock offering circular*" (*ibid.* (emphasis added)). Indeed, the court noted (*id.* at 7a-8a), the FHLBB specifically requires that conversion stock offering materials contain a legend stating that the FHLBB

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[2] 12 U.S.C. 1725(j)(2) provides in pertinent part:

> Any aggrieved person may obtain review of a final action of the Federal Home Loan Bank Board * * * which approves, with or without conditions, or disapproves a plan of conversion pursuant to this subsection only by complying with the provisions of [12 U.S.C. 1730a(k)] * * *.

See also 12 U.S.C. 1464(i)(4). 12 U.S.C. 1730a(k) in turn vests exclusive jurisdiction to review orders of the FHLBB in the United States courts of appeals and provides that review must be sought within 30 days of the final action at issue.

has not passed on the accuracy or adequacy of the offering circular. 12 C.F.R. 563b.7(d), 563b.102.

DISCUSSION

The decision below is correct. It does not conflict with any decision of this Court or of any other court of appeals. In particular, it does not conflict with the decisions of two other courts of appeals that have considered the relationship between the conversion process and enforcement of the securities laws. Accordingly, review by this Court is not warranted.

1. The antifraud provisions of the federal securities laws clearly apply to the offer and sale of securities issued by savings institutions. See *Tcherepnin* v. *Knight*, *supra* (withdrawable capital shares of savings institution are securities for purposes of the securities laws). Although Congress exempted securities issued by savings institutions from certain registration requirements of the securities laws, 15 U.S.C. 77c(a)(5)(A), it did not exempt such securities from the antifraud provisions of those laws.

Common stock issued pursuant to a conversion from a mutual to a stock form of ownership is no exception to this general rule. In granting authority to the FHLBB to approve conversions, Congress did not in any way suggest that investors in converted thrift companies should be deprived of the protections against securities fraud available to investors in other companies. The exclusive jurisdiction provision applicable to conversions is limited to final orders of the FHLBB that approve or disapprove a conversion plan. It does not purport to extinguish federal securities fraud claims that may arise as a result of materially false or misleading statements

in offering documents distributed by converting savings institutions.

This Court has repeatedly held that "repeals by implication are not favored." *TVA* v. *Hill*, 437 U.S. 153, 189 (1978) (quoting *Morton* v. *Mancari*, 417 U.S. 535, 549 (1974)). Repeal may be implied only where there is a "plain repugnancy" between statutory schemes. *Gordon* v. *New York Stock Exchange*, 422 U.S. 659, 682-683 (1975). Petitioners in this case can demonstrate no such repugnancy. FHLBB regulation of conversions is fully compatible with the antifraud provisions of the securities laws. Indeed, the FHLBB has itself concluded that "the antifraud provision[s] of the federal securities laws are applicable to all offers for sale of securities, assuming the use of jurisdictional means * * *." 48 Fed. Reg. 31614-31615 (1983) (comment accompanying amendments to FHLBB disclosure regulations, 12 C.F.R. Pts. 563b, 563c, 563d).

In *SEC* v. *National Securities, Inc.*, 393 U.S. 453 (1969), this Court found no conflict between state regulation of insurance companies and the normal operation of the securities laws. The SEC in that case alleged misrepresentations and omissions in communications to shareholders concerning a merger of two insurance companies. The defendants argued that the action was barred by Section 2(b) of the McCarran-Ferguson Act, which provides that no federal law "shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance." 15 U.S.C. 1012(b). They contended that, because the state director of insurance had approved the merger and found it not to be inequitable or contrary to law, the merger was immune from challenge by the SEC.

This Court disagreed, concluding that approval of the merger by the state did not conflict with the requirement of the securities laws "that insurance companies speak the truth when talking to their shareholders" (*ibid.*).

Similarly, there is no reason why FHLBB approval of a plan of conversion should preclude application of the securities laws to misstatements and omissions in the offering circular of a converting institution. FHLBB regulations prohibit representations in the offering circular that the FHLBB has passed on the circular's accuracy or adequacy (12 C.F.R. 563b.7 (d)) and require that a notice to that effect appear in the circular itself. 12 C.F.R. 563b.102. Such a notice appeared in the circular that respondents challenge in this case.

Adoption of petitioners' position could virtually immunize converting institutions from liability for misstatements and omissions in their offering materials. Judicial review of an FHLBB order approving or disapproving a conversion must be sought within 30 days of the order. 12 U.S.C. 1730a(k). Investors will often not be able to discover a misstatement within that time, particularly since they may not even have purchased their stock by then. Indeed, the conversion stock offering itself may not be made within that 30-day period. See 12 C.F.R. 563b.3(c)(11). As the court of appeals noted, one should not assume that Congress intended such an untoward result without an "unmistakable expression" to that effect (Pet. App. 8a).

2. The decisions of the two other courts of appeals that have indirectly addressed this issue do not conflict with the decision of the court below. In each case the court found that, on the facts presented, the

asserted securities law claims were in reality a challenge to the FHLBB order approving the particular conversion. *Harr* v. *Prudential Fed. Sav. & Loan Ass'n*, 557 F.2d 751 (10th Cir. 1977), cert. denied, 434 U.S. 1033 (1978); *Craft* v. *Florida Fed. Sav. & Loan Ass'n*, 786 F.2d 1546 (11th Cir. 1986). In light of the exclusive jurisdiction vested in courts of appeals to hear such challenges, the courts of appeals therefore concluded in each case that the district court lacked jurisdiction to hear the disguised attack on the FHLBB's order. But the decisions do not purport to divest the district courts of jurisdiction to hear legitimate federal securities law claims that do not challenge an FHLBB conversion order.

The *Harr* plaintiffs alleged that the date of record selected by the savings and loan, and approved by the FHLBB, for determining ownership in the mutual association (to qualify for free stock) was part of a conspiracy to benefit the association's directors and officers, and that the conversion plan itself was somehow a fraudulent and deceptive device in violation of Section 10(b) and Rule 10b-5. They also alleged that the proxy materials were misleading, but the complaint failed to identify any false or misleading statements. Under these circumstances, the Tenth Circuit correctly concluded that "the sole thrust of plaintiff's argument" was that the Board should not have approved the plan and that the allegations of securities fraud were at bottom "nothing more than an assertion that the plan is wrong and should not have gone into effect." 557 F.2d at 754. See also *Harr* v. *FHLBB*, 557 F.2d 747 (10th Cir. 1977), cert. denied, 434 U.S. 1033 (1978) (in which the *Harr* plaintiffs directly challenged the FHLBB's approval of the conversion).

Similarly, the plaintiffs in *Craft* challenged a decision, approved by the FHLBB after the plaintiffs had subscribed to a conversion plan, to increase the number of shares in the public offering. They argued that the savings and loan was obligated to recirculate the offering materials and permit rescission by the original subscribers. The court held that the suit was a challenge to the plan itself and that the district court lacked jurisdiction to hear plaintiffs' claim under 12 U.S.C. 1725(j)(2) and 1730a(k). The court stressed that plaintiffs' fraud claims were merely "bare bones allegations made to escape [these] exclusive review provisions" and that plaintiffs had not in fact "allege[d] any false or misleading statements" (786 F.2d at 1554). The court specifically noted that it was *not* saying that the district court would not have jurisdiction over a claim of securities fraud (*ibid.*):

> We are not called upon here to decide, nor do we express any views concerning the jurisdiction *vel non* of the district court under the federal securities laws when securities fraud is properly alleged and there has been Bank Board approval of a savings and loan conversion.

Respondents here allege garden variety securities fraud—that they purchased securities based on misrepresentations concerning the financial condition of Pacific First. As the court below concluded (Pet. App. 11a), these claims state an antifraud cause of action under the securities laws, which the district court properly should consider on the merits.[3] In

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[3] Petitioners contend (Pet. 13-14) that, because one of the numerous allegations of misstatements in the offering circular is comparable to the allegation in *Craft* (*i.e.*, the sale of addi-

contrast, *Harr* and *Craft* essentially attacked the decision of the FHLBB in approving the conversion plan and were correctly dismissed on jurisdictional grounds. All of these decisions stand for a single proposition: that the district courts have jurisdiction to hear valid claims of securities fraud in connection with an approved conversion, but lack jurisdiction to hear a challenge to an FHLBB approval in the guise of a securities law claim.[4] No court has reached a contrary conclusion.

3. Petitioners also contend (Pet. 11-12) that applying the antifraud provisions of the federal securities laws to offers and sales of stock issued by converting thrift institutions will destabilize the conversion process and threaten the viability of the thrift industry. That contention is baseless. As far as we are aware, only one of the several hundred institutions that have converted under the FHLBB regulations to date has faced properly alleged claims for securities fraud. Moreover, the FHLBB has expressly endorsed the value of full and fair disclosure by savings institutions as *fostering* the ability of insured institutions to raise capital and *improving* institu-

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tional stock to the public), this case is indistinguishable from *Craft*. That argument ignores the additional detailed claims of fraud alleged by respondents here, including false statements concerning the value of Pacific First's loan and real estate portfolios, the adequacy of its reserves and its reasonably anticipated future earnings.

[4] The FHLBB filed *amicus* briefs in the court of appeals in *Harr* and in the district court in *Craft*. The SEC filed *amicus* briefs in the court of appeals in both *Craft* and the present case. The positions urged by the agencies were consistent with each other, consistent with the decisions reached by the courts of appeals in the two earlier cases, and consistent with the decision by the court below in this case.

tional safety and soundness. See 50 Fed. Reg. 53284, 53285 (1985).[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1987

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[5] Petitioners further argue that, to the extent an adverse judgment would require Pacific First to rescind its sales contracts, such a remedy would violate FHLBB regulations restricting repurchases. See 12 C.F.R. 563b.3g). The argument is ill-founded for two reasons. First, respondents here do not seek rescission, only damages. Second, it is premature to consider the possible effects of particular remedies, since this case in its present posture "involves only the threshold question of whether a federal court has jurisdiction over the complaint filed by the [respondents] * * *." *Tcherepnin* v. *Knight*, 389 U.S. at 346.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1987 181483 40330

No. 86-940

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

PACIFIC FIRST FEDERAL SAVINGS BANK,
PRICE WATERHOUSE and
KAPLAN, SMITH & ASSOCIATES, INC.,
Petitioners,

v.

WAYNE C. REMBOLD, KAREN D. REMBOLD,
DARRELL STEELE and LYLE SCHNEIDER,
Respondents.

FURTHER REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Respondents.

FURTHER REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully submit this further reply in response to the Brief For The United States As Amicus Curiae.

1. The United States argues "there is no reason why FHLBB approval of a plan of conversion should preclude application of the securities laws to misstatements and omissions in the offering circular of a converting institution." The relevant issue, however, is not whether the antifraud prohibitions of the securities laws apply to the offer and sale of securities issued by savings institutions. As the United States recognizes, the FHLBB has adopted antifraud regulations applicable to offering circulars, modeled after the SEC's own regulations. *See* 12 C.F.R. § 563b.3(h) (1983); 48 Fed. Reg. 31614-31615 (1983). The narrower issue in this case concerns the appropriate private remedy and, specifically, whether a purchaser can circumvent Congress' restriction on the remedy available in the unique context of a federal agency-approved

mutual-to-stock conversion by framing a challenge to the terms and conditions of the conversion as a securities law claim.

2. The United States argues that the decision of the court below does not conflict with the decisions in *Craft* and *Harr* because in those cases the asserted securities law claims "really" were a challenge to the FHLBB order approving the particular conversion, whereas this is a "garden-variety" fraud case. In this case, however, the court of appeals refused to consider whether the complaint truly stated a claim for securities fraud, even though the district court ruled that the complaint was, as in *Craft* and *Harr*, simply a disguised attack on the FHLBB's order approving the conversion. By contrast, in both *Craft* and *Harr*, the courts dismissed securities law claims on jurisdictional grounds without granting leave to cure pleading deficiencies, as would have been appropriate if the courts had jurisdiction over a "valid," well-pleaded claim.

3. It is difficult to understand the basis for the assertion of the United States that the *amicus* briefs previously filed by the SEC and the FHLBB in *Craft* are consistent with each other and with the decision under review in this case. In *Craft*, the FHLBB argued that the securities law claim that the Crafts "were defrauded by Florida Federal" in connection with its conversion "amounts to nothing more than a challenge to the equitability of Florida Federal's conversion plan as approved by the Bank Board." Brief Of The FHLBB In Support Of Defendant Florida Federal Savings And Loan Association's Motion To Dismiss at 6, *Craft v. Florida Federal Savings and Loan Association*, No. 83-1084-CIV-T-13 (M.D. Fla. 1983). The FHLBB accordingly concluded that the district court's assertion of jurisdiction over the securities claim "would directly impugn the Bank Board's statutorily-imposed mandate to regulate conversions of savings and loan associations," *id.* at 7, and that "[j]urisdiction over the subject matter of [the Crafts'] complaint, if any, would have been in the appropriate Court of Appeals." *Id.* at 10. The SEC, on the other hand, flatly urged the courts of appeals in *Craft* and in this case to rule "that the [FHLBB's] approval of a plan permitting a savings and loan association to convert to a stock company does not divest a federal district court of jurisdiction to consider antifraud claims

under the federal securities laws." Brief Of The SEC, Amicus Curiae at 17, *Craft v. Florida Federal Savings and Loan Association,* 786 F.2d 1546 (11th Cir. 1986).[1]

4. The United States also argues that this case is distinguishable from *Craft* because, *in addition* to the identical allegations in *Craft* and this case concerning the increase in the number of shares sold to the public and in the aggregate offering price approved by the FHLBB, the complaint in this case alleges that the appraisal was affected by false valuations of Pacific First's loan and real estate portfolios, the adequacy of its reserves and its reasonably anticipated future earnings.[2] The United States would thus concede that the court of appeals erred in failing to distinguish those claims which the United States believes may be asserted in district courts and those which must be made in the court of appeals. For this reason alone, certiorari should be granted.

5. The United States also suggests that the Ninth Circuit's decision will not destabilize the conversion process because "only one of the several hundred institutions that have converted under the FHLBB regulations to date has faced *properly*

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[1] To the extent that the United States intends to suggest that the two agencies are in agreement that district courts have jurisdiction to consider "valid" securities law claims but not claims that are merely in the "guise" of such a claim, the distinction is meaningless. A bogus claim, *i.e.,* a complaint that fails to state a claim under the securities laws, would always be subject to dismissal, on a basis other than jurisdictional grounds. On the jurisdictional issue presented in this petition, the agencies' previous statements are, quite simply, diametrically opposed. The FHLBB understandably may desire to obscure this difference, given the intense criticism the FHLBB has recently received in Congress for its alleged failure to be an aggressive enforcer of the securities laws. *See, e.g., Subcommittee On Oversight And Investigations Of The Committee On Energy And Commerce, U.S. House Of Representatives, 100th Cong., 1st Sess., Consolidation Of The Administration And Enforcement Of The Federal Securities Laws Within The Securities And Exchange Commission* (Comm. Print 1987). However, whether or not there is a particular private remedy does not necessarily affect the enforcement powers or jurisdiction of the agencies. The FHLBB was correct the first time it spoke, when it filed its *amicus* brief in *Craft.*

[2] The district court, of course, considered these "additional" allegations in ruling that the complaint was, as in *Craft,* but a disguised challenge to the FHLBB's order.

alleged claims for securities fraud." (Emphasis added). Given the ease with which securities law claims with little merit but considerable potential settlement value may be brought, *see Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739-740 (1975), it would appear that a more likely explanation for the paucity of such cases to date is that, prior to this case, every court to consider the issue (except the district court in *Craft*) has rejected attempts to evade the statutory requirement that a person aggrieved by a conversion must proceed in a court of appeals. The United States cautiously avoids any prediction as to the number of claims which may be filed if the court of appeals' decision is allowed to stand.

CONCLUSION

For the reasons set forth above and in the Petition, a writ of *certiorari* should be granted.

Respectfully submitted,

/S/ JAMES H. SCHROPP

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